

**Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center and Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, Cases 19-CA-11149, 19-CA-11179, and 19-RC-9156**

April 23, 1981

### DECISION AND ORDER

On September 10, 1980, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In fn. 56 of his Decision, the Administrative Law Judge inadvertently referred to "Respondent's Exhibit 5(a-e)" rather than to "General Counsel's Exhibit 5(a-e)." The error is hereby corrected.

<sup>2</sup> In sec. III,D,1, par. 12, of his Decision, the Administrative Law Judge stated that Respondent's threats to withhold a wage increase were unlawful because they were made in the context of "other more egregious and pervasive unfair labor practices." We disavow this statement, and decide that Respondent's threats were by themselves violations of Sec. 8(a)(1) of the Act.

In sec. III,D,2, par. 5, of his Decision, after finding that certain interrogations violated Sec. 8(a)(1) of the Act, the Administrative Law Judge noted that Respondent did not follow the standards set forth in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), in questioning the employees. Inasmuch as it is clear that Respondent was not polling its employees to determine the truth of a claim that the Union had majority support, the Administrative Law Judge's reference to *Struksnes* is irrelevant and we disavow it.

We agree with the Administrative Law Judge's finding, in sec. III,D,2, par. 9, of his Decision, that Montrose's interrogation of Shepherd violated Sec. 8(a)(1) of the Act, but do not agree that it created the impression that Montrose was engaged in unlawful surveillance of employees' union activities.

In affirming the Administrative Law Judge's conclusion that Respondent unlawfully solicited grievances from employees, Member Jenkins does not rely on *Uarco Inc.*, 216 NLRB 1 (1974), a case in which he dissented.

<sup>3</sup> The Administrative Law Judge concluded that Respondent violated Sec. 8(a)(1) of the Act by threatening an employee with loss of a projected wage increase, but he neglected to provide a specific cease-and-desist provision to correspond to the violation. To correct this oversight, we shall modify par. 1(a) of the recommended Order and issue a new notice. We shall also correct the Administrative Law Judge's failure to set forth the appropriate bargaining unit in par. 1(f) of his recommended Order.

We agree with the Administrative Law Judge's statement in fn. 168 of his Decision that a broad order is warranted to remedy Respondent's unfair labor practices. In so doing, we emphasize that we rely on *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and conclude that Respondent's misconduct is such as "to demonstrate a general disregard for the employees' fundamental statutory rights."

With respect to the backpay owed to employee Wanda Longie, Member Jenkins would award interest based on the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

In his Decision the Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) when it discharged employee Wanda Longie because "it is apparent that a substantial or motivating, but perhaps not necessarily sole reason contributing to Longie's discharge was her well-known affiliation and activity on behalf of the Union and the Respondent's continued opposition to union representation of its employees, despite the existence of a lawful cause for such termination."

Shortly before the issuance of the Administrative Law Judge's Decision in this proceeding, we issued our decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). That decision sets forth the mode of analysis for examining causation in cases such as this. Although the Administrative Law Judge failed to apply that mode of analysis, we find that his determination that Respondent improperly discharged Longie is correct and the facts necessary to that determination were appropriately found.

Thus, the General Counsel initially satisfied his burden of making a *prima facie* showing sufficient to support the inference that Longie's activities on behalf of the Union were a motivating factor in her discharge. Respondent admits that beginning in December 1978 it knew that the Union was attempting to organize its employees. The record amply supports the Administrative Law Judge's finding that Respondent had knowledge of Longie's active participation in that organizing effort before it discharged her. Similarly supported is his finding that Respondent's course of conduct to discourage membership in and activities on behalf of the Union clearly demonstrates that Respondent harbored union animus. It made that animus known to its employees.

Further, the Administrative Law Judge carefully evaluated the reasons advanced by Respondent for its discharge of Longie. He noted that Respondent's witnesses gave conflicting testimony and that Longie's pattern of absenteeism did not justify discharge of Longie in February 1979, particularly in light of Respondent's prior tolerance of similar levels of absenteeism. The Administrative Law Judge also found that Respondent failed to establish its need to reduce the number of hours worked by its aides. These findings, which we affirm, lead us to conclude that Respondent failed to demonstrate that it would have discharged Longie in the absence of her union activity.

Accordingly, although the Administrative Law Judge utilized terms such as "in part" or "substantial or motivating cause" in describing causality (characterizations which *Wright Line* discourages), we conclude that his analysis is in harmony with

the analytical objectives set forth in *Wright Line*. We therefore affirm his conclusion that Respondent's discharge of Longie violated Section 8(a)(3) and (1) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center, Dillon, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Threatening and warning its employees with layoff and/or termination, with loss of a projected wage increase, and with 'tougher' or 'rougher' working conditions if they continue to support or assist the union."

2. Substitute the following for paragraph 1(f):

"(f) Refusing to recognize and bargain with Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the appropriate unit. The appropriate collective-bargaining unit is:

All licensed practical nurses, technical employees and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all other professional employees, business office clerical employees, guards and supervisors as defined in the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT threaten or warn you with layoff and/or termination, with loss of a projected wage increase, and with "tougher" or "rougher" working conditions if you continue to support or assist the Union.

WE WILL NOT coercively interrogate you concerning your union membership, activities, or support.

WE WILL NOT solicit grievances from you and promise that such grievances will be ad-

justed for the purpose of influencing your selection of a union as your bargaining representative.

WE WILL NOT prohibit you from discussing the union at all times at our premises, thus obstructing your right to engage freely in union organizational activity.

WE WILL NOT discourage membership in or activities on behalf of Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, or any other labor organization, by laying off, terminating, or discharging you, transferring you to a less desirable work shift, or otherwise discriminating against you for supporting a union.

WE WILL NOT refuse to recognize and bargain with Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, as your collective-bargaining representative in the following appropriate unit:

All licensed practical nurses, technical employees and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all other professional employees, business office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Wanda Longie immediate and full reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings or other benefits resulting from her layoff and/or termination, plus interest.

WE WILL, upon request, bargain collectively with Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, as your exclusive representative in the appropriate unit described above, and, if an understanding is reached, embody such understanding in a signed contract.

SANITAS CURA, INC., D/B/A PARK-  
VIEW ACRES CONVALESCENT  
CENTER

## DECISION

## STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge: Upon charges filed in Cases 19-CA-11149 and 19-CA-11179 on February 23 and March 6, 1979, respectively, by Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, Seattle, Washington, duly issued an order consolidating these cases, a consolidated complaint and notice of hearing on April 9, 1977, against Sanitas Cura, d/b/a Parkview Acres Convalescent Center, herein called Respondent, alleging that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein referred to as the Act. On April 23, 1979, Respondent, by counsel, duly filed its response to the consolidated complaint denying the material allegations therein.<sup>1</sup>

Previously on January 10, 1979, the Union filed with the Board a petition for certification of representative in Case 19-RC-9156 seeking an election among all Respondent's licensed practical nurses,<sup>2</sup> technical employees, and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all professional employees, business office clerical employees, guards and supervisors as defined in the Act. Pursuant to an Agreement for Consent Election executed by the parties and approved by the Regional Director for Region 19 on February 1, 1979, a secret-ballot election was conducted among all Respondent's unit employees on February 26, 1979. The official tally of ballots showed that 17 votes were cast in favor of the Union, 21 votes against, and 2 ballots were challenged.<sup>3</sup> On March 2, 1979, the Union filed timely objections to the election. The Regional Director, after concluding that the objections to the election in Case 19-RC-9156 and the allegations of various violations of Section 8(a)(1), (3), and (5) of the Act by Respondent in Cases 19-CA-11149 and 19-CA-11179 "raise substantial and material factual issues" and "are identical," duly issued an order consolidating all these cases "for the purposes of hearing, ruling, and decision by an Administrative Law Judge and that thereafter 19-RC-9156 shall be severed and transferred to the Regional Director for further processing."

A hearing in the consolidated cases was duly held before me in Butte, Montana, on July 24 and 25, 1979. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, briefs were filed by counsel for the General Counsel and Respondent.

<sup>1</sup> The consolidated complaint herein was amended at the hearing, pursuant to a notice of hearing dated July 16, 1979, to amend the consolidated complaint. Respondent denied the allegations in the amendments to the consolidated complaint.

<sup>2</sup> Licensed practical nurses will hereinafter be referred to as LPNs.

<sup>3</sup> The challenged ballots were not sufficient in number to affect the results of the election.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

Respondent, at all times material herein, has been a corporation engaged under and existing by virtue of the laws of the State of Montana, maintaining its principal office and place of business in Dillon, Montana, where it is, and has been continuously, engaged in the business of long-term nursing care. In the course and conduct of Respondent's business operations during the preceding 12 months, these operations being representative of its operations at all times material herein, the Respondent had gross sales of goods and services valued in excess of \$100,000, and during the same period of time, purchased and caused to be transferred and delivered to its facilities within the State of Montana goods and materials valued in excess of \$50,000 directly from sources outside the State of Montana, or from suppliers within the State of Montana which in turn obtained such goods and materials directly from sources outside the State of Montana. The consolidated complaint alleges, Respondent admits, and I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaint alleges, Respondent admits, and I find that Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

The consolidated complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by threatening its employees that they would lose their jobs if they became or remained members of the Union, or gave any assistance or support to it; by threatening to make it "rough" on employees once the Union got in; by threatening to hold back any wage increase which the employees might be entitled to during the Union's organizational campaign; by warning its employees not to discuss the Union among themselves at any time; by interrogating its employees concerning their membership in, activities on behalf of, and sympathy in the Union; by laying off Wanda Longie and failing and refusing to reinstate her and by requiring Sheila Shepherd to work a less desirable work shift and at times to work alone on the afternoon or swing shift because they joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining, or mutual aid or protection; and by refusing and continuing to refuse to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of employees

in an appropriate unit. Respondent denies these allegations.

### A. Background

Respondent operates a nursing home and convalescent center in Dillon, Montana. Ordell Bakke is Respondent's president, George Montrose is the administrator, Sarah McEldery is the director of nursing, and Margaret Nelson is the dietary or kitchen supervisor. The General Counsel alleges, Respondent admits, and I find that the above named persons are supervisors within the meaning of Section 2(11) of the Act, and have been and are now agents of Respondent acting on its behalf.

The testimony herein discloses that at the time of this hearing Respondent employed approximately 52 or 53 employees and had about 68 patients in residence. Among the employees were "roughly" 45 LPNs and nurses aides. There are basically three work shifts at the nursing home over a 24-hour-per-day period to provide continuous availability of care for patients; a day shift from 6 a.m. to 2 p.m. or 7 a.m. to 3 p.m.; an afternoon (swing) shift from 3 p.m. to 11 p.m.; and a night (graveyard) shift from 11 p.m. to 7 a.m. There are generally eight nurses aides and an RN and LPN on duty during the day shift, six nurses aides and one LPN on the afternoon shift with another LPN added from 5 p.m. to 10 p.m. on that shift if available and based on patient census, and two nurses aides on the night shift.

### B. The Appropriate Unit

The consolidated complaint alleges, Respondent's answer admits, and I find that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of: All licensed practical nurses, technical employees and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all other professional employees, business office clerical employees, guards and supervisors as defined in the Act. At the hearing the parties stipulated that as of December 27, 1978, the total number of unit employees employed by Respondent was 39.<sup>4</sup>

### C. The Evidence<sup>5</sup>

#### 1. The Union's organizational campaign

It appears from the evidence herein that the Union began its organizational campaign among Respondent's

<sup>4</sup> The stipulation includes the following employees: Flaherty, Hight, Georgia Buchanan, Sheila Shepherd, Carr, J. Anderson, Loretta Read, Diane L. Hesch, Vassa Hupe, Hill, Carolyn Lee, Bonnie Lynnes, Nix, Charlotte Bianchi, M. Johnson, Marie S. Cromwell, Ronald Johnson, Scott D. Fels, Wanda Longie, Mary Vanderwater, Kelly J. Weidinger, Janice Littlefield, Virginia Karr, Constance Thompson, Sandra Myers, Verna Baker, Dolores Roberts, Patricia Wehri, Elizabeth A. Windsor, Ella Edwards, Tricia Kennedy, Margery A. Ivie, Carol Milgies, Milan Cronkovich, Beverly J. Beach, Cindy Ziler, Veronica Rebich, Selway, and Stout.

<sup>5</sup> It should be noted that pursuant to a request by the General Counsel for the sequestration of witnesses which I granted, there being no objection thereto by Respondent, all witnesses were sequestered including the discriminatees who were excluded during the General Counsel's case in

employees sometime in December 1978, and included the obtaining of signed authorization cards from unit employees.<sup>6</sup> On or about December 27, 1978, the Union demanded that Respondent recognize it as the exclusive bargaining representative of Respondent's employees in the appropriate unit.<sup>7</sup> Respondent refused to recognize the Union, whereupon on January 10, 1979, the Union filed a petition for an election with the Board. As set forth above the Board conducted an election on February 26, 1979, which the Union lost.

#### 2. The conversation between Longie and McEldery

Wanda Longie, a witness for the General Counsel, testified that she was hired by Respondent as a nurses aide<sup>8</sup> sometime in January 1977 and worked as a full-time employee until December 1977. Thereafter she worked part time from January 1978 until February 9, 1979, when she left Respondent's employ.<sup>9</sup> Longie continued that in mid-December 1978 she signed an authorization card for the Union and also solicited and obtained the signatures of 13 additional employees on such authorization cards. Longie related that she went to each individual employee's home and secured the 13 signatures within a week's time.<sup>10</sup> She added that during the period from December 12, 1978, to February 1979 she also attended approximately seven or eight union meetings stating, "One was at the Catholic Center and one was at the Law Enforcement Center. The rest were at my home."

Longie related that one morning in December 1978 during the same period she was active obtaining signed

chief and excepting a representative of each of the parties needed for the proper presentation of their respective positions herein.

<sup>6</sup> In evidence as G.C. Exhs. 3(a)-(f) are signed union authorization cards for the following unit employees: Tricia Kennedy (12-18-78), Sandra Myers (12-18-78), Janice Littlefield (12-16-78), Kelly J. Weidinger, (12-18-78), J. Anderson (12-18-78), Sheila Shepherd (12-14-78), Georgia Buchanan (12-14-78), Diane L. Hesch (12-18-78), Diana Winstead (12-20-78), Ronald Johnson (12-18-78), Milan Cronkovich (12-18-78), Sullivan A. Dolson, Charlotte Bianchi (12-14-78), Wanda Longie (12-12-78), Marie S. Cromwell (12-18-78), Bonnie Lynnes (12-18-78), Scott D. Fels (12-18-78), Verna Baker (12-19-78), Carolyn Lee (12-20-78), Elizabeth A. Windsor (12-19-78), Vassa L. Hupe (12-18-78), Eugene F. Burwelt (12-18-78), Mary Vanderwater (12-18-78), Margery A. Ivie (12-16-78), Loretta Read (12-19-78), Cindy Ziler (12-18-78), Veronica Rebich (12-20-78), Beverly J. Beach (12-18-78), Ella Edwards (12-18-78), Carol Milgies (12-18-78), Patty Wehri (12-18-78), and Dolores Roberts (12-18-78). At the time these authorization cards were received in evidence the parties stipulated "to the authenticity of the cards," and that "they were signed by the individuals whose name appears on the face of each card on the date indicated on that card." The dates thereon appear in parenthesis after each name above.

<sup>7</sup> At the time the Union made its demand it represented at least 29 of the employees listed in the stipulated unit as of December 27, 1978, according to the signed authorization cards in evidence. However the General Counsel presented three additional signed authorization cards of employees presumably also in the unit but not listed among the names of employees in the above stipulation, these being Sullivan A. Dolson, Diana Winstead, and Eugene F. Burwelt. While this remained unexplained in the record, the parties did stipulate to the authenticity of all these authorization cards.

<sup>8</sup> Longie's duties as a nurses aide consisted in caring for patients, feeding, dressing, and bathing them, changing hospital beds, "and things of that nature."

<sup>9</sup> Longie also testified that the last day she actually worked for Respondent occurred sometime in January 1979.

<sup>10</sup> The signed authorization cards in evidence show dates ranging from December 12 to 20, 1978.

union authorization cards from her fellow employees, she received a telephone call at her home from Sarah McEldery, Respondent's director of nurses, who told her,

"I heard through the grapevine that you are starting this union business up again." I said, "Well we have the right to organize if we would like." And she said, "Well aren't you happy, haven't things gotten better?" And I said, "Well, nothing ever seems to get done." And she said something to the effect of "Don't you know, this might mess up the raise you are supposed to get in January, the minimum wage?" And I said, "Well, that's a Federal raise and I don't see how it would mess it up, starting a union."<sup>11</sup>

Longie stated that over the phone McEldery sounded "very angry and upset about finding out about me starting up the union again."<sup>12</sup>

<sup>11</sup> On cross-examination Longie testified that McEldery had stated early in December 1978, that on January 1, 1979, the minimum wage would go up and that Respondent's employees would get a raise. However in an affidavit given to a Board agent during the investigatory stage of this proceeding she stated that "Everyone understood for several months they would get a raise when the minimum wage went up." This is what Sally told us. The following testimony of interest was also given by Longie on cross-examination:

Q. These occasions on which you said you were told that "minimum wage increase would be messed up" were the times that Sally [McEldery] talked to you and also the times George [Montrose] talked to you? They also said "Del Bakke once held back a wage increase at another facility during a union organization drive?" You testified to that, did you not?

A. Yes.

Q. Did they go on to elaborate as to the reasons why that wage increase was held back?

A. Just that the employees were talking about going union.

Q. The employees in the facility in which the thing was held back? Was that the reason that was given?

A. Yes.

<sup>12</sup> Concerning this Longie testified that previously, sometime in August 1978, she and "a few of the girls" decided to contact a union and have its representative "come down and talk and then we could ask questions" because "something needed to be done." She stated that the Union was then contacted, a meeting was arranged and subsequently in that same month of August 1978, Nadine Jensen, a union representative met with approximately 15 to 20 of Respondent's employees at Longie's house. Longie related that after this meeting was concluded and later that same evening, she received a telephone call from Sarah McEldery, Respondent's director of nurses, who said, "How come you are trying to get a union started? Things have gotten a little bit better, haven't they?" Longie continued that after she told McEldery that things appeared to be "just about the same. Things never get done," McEldery asked her how many other employees were involved and "she wanted to know why—if we couldn't try to work things out just between the employees, she wanted to get an employees' association started, she said she didn't like unions, they don't help." Longie added that after the meeting at her home in August 1978 with the Union's representative, Nadine Jensen, and the accompanying telephone call from McEldery she engaged in no union activity thereafter nor did she solicit any employee signatures on authorization cards until the Union's organizational drive began in December 1978. In fact it appears from the evidence that from August 1978 until December 1978 nothing was further done by either the employees or the Union about organizing Respondent's employees. According to Longie, McEldery did not threaten her thereafter with the loss of her job if she engaged in union activities nor did McEldery mention the Union at all to her until December 1978.

Sheila Shepherd, an LPN employed by Respondent, also testified about a conversation she had with Sarah McEldery, Shepherd's overall supervisor, which occurred in August 1978, at Respondent's nursing home "in the break room where the nurses report." Shepherd related, "Sally [McEldery is often called 'Sally' by the employees although her given

Longie continued that McEldery also asked her if she had instigated the Union's organizational campaign by calling the Union's offices in Helena, Montana, to which Longie responded, "We all got together and decided to do it together." According to Longie, McEldery additionally asked her as to how many other employees were "involved" and she answered, "Well, most all the aides. And there were one or two out of other departments, housekeeping and one laundry." She stated that McEldery then said to her, "Well, the laundry and housekeeping, if you do get it, they can't be in the same group as you. If you do, it will just be the aides and no nurses or RNs in with it."

name is Sarah] said there's been union talk. Don't get involved. The LPNs are not to go to any of the meetings or have anything to do with it." Shepherd added that "two nurses" were also present at the time this conversation with McEldery took place, Jean Hight and "maybe Georgia Buchanan" both of whom are LPNs. Shepherd related that after her conversation with McEldery in August 1978, McEldery never discussed the Union with her again until December 1978, and actually, according to Shepherd, tried to avoid Shepherd because she had told McEldery that "I don't feel that the girls were being paid enough for all the work they had to do and the way they were short-handed all the time." Shepherd stated that McEldery responded that they were being paid "as good as anybody else in town and that the benefits were excellent and we shouldn't complain about it and she didn't like me, you know, having this say."

McEldery testified that she had heard rumors about union activity at the nursing home in August 1978, but "I never followed it up or paid any attention." She denied speaking to any of Respondent's employees about it at that time.

Georgia Buchanan, formerly employed by Respondent as an LPN at its nursing home during the times material herein testified that she was one of the employees who had attended the union meeting at Longie's home in August 1978. She stated that soon thereafter she was called into administrator George Montrose's office at the nursing home and asked by Montrose if she had attended the union meeting at Longie's home. She continued, "He was talking about the union and asked me if I had attended, asked me who else may have attended, telling me that I should not get involved, especially being a nurse, and that the meetings should be organized, we should have a president, secretary, vice president, and we talked for maybe fifteen, twenty minutes." Buchanan did not testify about the conversation between Shepherd and McEldery which occurred in August 1978 and about which Shepherd had testified that Buchanan might have been present. Hight, also an LPN, was not called as a witness at all.

Shepherd also testified that in August 1978, following the meeting held that month at Longie's home during which 10 or 15 of Respondent's employees including herself met with Nadine Jensen, the Union's representative, she was called into George Montrose's office where Montrose asked her if she "knew of any of the union talk that was going on, if it was true, and if I knew who would be in charge of it, if I knew who he could talk to about it."

While George Montrose did not directly testify concerning this particular conversation with Shepherd he did admit that he spoke to employees other than Wanda Longie and Georgia Buchanan about "the union organizing activities" and on "a couple of occasions" but could not recall when these conversations took place.

Mary Johnson, formerly employed by Respondent as a nurses aide, testified that sometime in the summer of 1978 she attended a meeting at Wanda Longie's house wherein employees discussed the possibility of union representation. She stated,

We decided we would go to George [Montrose] and see what we could do about our wages because that was the biggest problem at that time. We went to George. They did a new policy on an hourly raise—hourly raising our wages and everything was straightened out . . . No more conflict.

It should be noted that counsel for the General Counsel stated that the August 1978 conversation between Longie and McEldery was "merely offered as background."

Sarah McEldery, one of Respondent's witnesses, testified<sup>13</sup> that she became aware sometime in December 1978 that Respondent's employees were interested in union representation, and additionally cognizant "from an employee that Wanda Longie was handing out union authorization cards in [early] January of '79."<sup>14</sup> She stated that she could have "called Wanda Longie on the telephone in December 1978" but she unequivocally denied telling Longie that "the union would interfere with the raise that was scheduled to become effective in January, 1979." She added that she has no authority to grant wage increases, or reduce employees' wages and in fact is never consulted at all about wages by Respondent. McEldery also denied ever asking any employee "if that employee had contacted the union or the union had contacted that employee," or if that employee had "started the union organization drive," or as to "how many union cards had been signed," or the reasons "why the employees were unhappy."

### 3. The conversation between Longie and Montrose

Longie also related a conversation she had with George Montrose, Respondent's administrator who sometime in December 1978 (between December 15 and 18, 1978) requested that she come to his office and according to Longie, when she subsequently appeared therein Montrose asked her, "if I was trying to get a union started and I said yes. He wanted to know if I was an instigator of it and I said, 'Well, we all just got together.'" Longie continued that Montrose then told her his views on the union,

... that he didn't like them, how they caused trouble between employees and employers, they can't communicate. And then he said something to the effect that if we do that Del Bakke might hold back on the minimum wage, he held back on another of his nursing homes when they were trying to get a union in. He asked why we were unhappy and ... that's about it.<sup>15</sup>

<sup>13</sup> The General Counsel also called McEldery as a witness pursuant to Fed. R. Evid. 611(c) at which time she testified that as director of nurses she is "responsible for the care of the nursing home residents (patients), the scheduling of help in the nursing department, the proper functioning of this department and the supervision of all RNs, LPNs and nurses' aides therein." McEldery stated that as director of nurses she can hire or fire employees "in conjunction and with the approval" of George Montrose, the administrator of the nursing home.

<sup>14</sup> McEldery also testified that she first learned about Longie's activities on behalf of the Union sometime in December 1978 from Longie herself.

<sup>15</sup> Concerning whether Longie had initiated the topic of "whether the union activity would affect the minimum wage" she testified,

Yes, I might have, or else he might have asked me. I'm not sure, but the subject was brought up. I don't know if I asked him or he asked me. [She did testify however that Montrose specifically said,] that in another facility Bakke had held back on the minimum wage for some time when they were trying to organize a union.

Bakke owns other nursing home facilities and Longie stated that she felt there might be some relation between what happened at the other facility and what could happen at Parkview Acres Convalescent Center. She added, "I kind of thought it might happen to us, but I just said well, it's a federal raise so I didn't think they could stop it anyway."

George Montrose, Respondent's administrator, called as a witness for Respondent,<sup>16</sup> testified that in late December 1978 or early January 1979 he had a conversation with Wanda Longie in his office after requesting that she come there, "specifically with the idea of determining what the grievances were<sup>17</sup> because we had heard rumors that there were cards being circulated for the union."<sup>18</sup> He continued,

And that was my specific question to Wanda, and because of the fact we weren't aware of any grievances that had been aired previously . . . what was the reason for this at this time. After that she asked me why I objected to the union and I told her and then after that she asked me if the wage increase that had been adopted earlier had been initiated in all three of Mr. Bakke's facilities. And I told her at that time that—I think my first response was yes but then I said that although I think that the wage increase was held up in Livingston because of some union litigation at the time.<sup>19</sup> When queried as to the reasons he gave Longie as to "why he objected

<sup>16</sup> Montrose was also called as a witness by the General counsel pursuant to Fed. R. Evid. 611(c) which allows leading questions to be asked of obviously hostile witnesses upon direct examination. At that time Montrose testified that as Respondent's administrator, his duties were to "oversee the operation" of Parkview Acres Convalescent Home, "oversee staffing, handle public relations and things like that."

<sup>17</sup> Montrose also testified that he was "curious about this problem" and therefore called Wanda Longie, a nurses aide, into his office because Longie was one of the employees who was "asking people to sign union authorization cards." Montrose admitted that during this conversation he asked Longie why the employees were organizing.

<sup>18</sup> While Montrose testified that he first learned about employee interest in union representation "about the first of the year" it appears from his own testimony and from other evidence in the record that he was aware of the Union's organizational efforts earlier in December 1978 and that his response elicited by counsel for the General Counsel's leading question created this ambiguity as follows:

Q. And you first learned some of your employees were interested in having a union represent them about the first of the year. Is that correct?

A. Approximately.

Montrose also testified that, "I don't know exactly how I learned it, but I would assume . . . a good possibility" was that either Sarah McEldery or Margaret Nelson had told him about employee involvement with the Union. However, in an affidavit given by Montrose to a Board agent during the investigatory stage of this proceeding he was more positive, stating, "I believe I learned about it through the Director of Nursing, Sally McEldery or the Kitchen Supervisor, Margaret Nelson."

<sup>19</sup> Montrose testified that, "I think she did ask me if it would affect the minimum wage increase coming up in January or whether we would get a minimum wage increase in January. And I think my response was 'It is hard to say, probably' although I had indications at that time that they were holding up making a decision on that because some people felt Congress might even rescind that possibility. But other than the minimum wage there was nothing I could say other than I would think that would take place." However in his affidavit given to the Board, Montrose stated,

I asked Wanda what the reasons were that they were organizing. I don't recall that she gave me any reasons. She asked why I would be opposed to it and I said that it was just a third party. I don't recall that any discussion of raises came up during this conversation. I can't recall anything further about this discussion.

Montrose explained this discrepancy between his testimony and his affidavit by stating, "I did not recall that part of the conversation" when he gave his statement to the Board's agent. Longie testified that Montrose never used the words "pending litigation" or "legality" in this conversation when referring to the reason for the deferral of a wage increase.

to the union" he stated, "Well my personal reason was it is just a third party to deal with. I don't think it is necessary." Montrose added that he was uncertain at the time as to who would receive "what raises" since Bakke would make the final decision.

Ordell Bakke, Respondent's president, called as a witness by Respondent, testified that Respondent's employees received a wage increase on January 1, 1979, pursuant to an increase in the Federal minimum wage rate. He stated that Respondent also owns two other nursing homes and at one of these Respondent held back a cost-of-living increase scheduled for September 1978 pending "the outcome of some labor disputes there" so as not to "aggravate any particular situation that was currently in existence in Livingston . . . ." Bakke added that the increase was subsequently implemented in October 1978 "before the dispute at the particular nursing home was completely resolved" and after Respondent sought legal advice from its attorney.

#### 4. The conversation between Shepherd and McEldery

Sheila Shepherd, employed by Respondent as an LPN and called as a witness for the General Counsel, testified that she signed a union authorization card in December 1978. Shepherd continued that she additionally solicited and obtained the signatures of 18 other employees on union authorization cards having spoken to these employees individually on behalf of the Union. She related that she also attended two or three union meetings during the month of December 1978, "two at Wanda Longie's and one at the Catholic Center."

Shepherd stated that, in late December 1978, Sarah McEldery called her while she was on duty at the nursing home, during the evening about 6 p.m. and told her,

Oh, and by the way, I don't want you getting involved with any of the union activities. You're not to go to any of the meetings, have anything to do with it because you can get into a lot of trouble and you'll probably lose your job.

Shepherd continued,

And I said, "Yes, I remember you had mentioned this to us one other time previous this year, this summer, when there was union talk." And she said, "Yes."

She said we weren't to go to any of the meetings that the aides would have because we were in a different category [LPNs], and that we weren't to have anything to do with the meetings or we could be in trouble.

Sarah McEldery testified that she was told sometime in January 1979 that "Sheila Shepherd was passing out cards . . . ." She denied telling any employee including Shepherd at "any time around Christmas" that she hoped that employee "was not getting involved in 'the union nonsense,'" nor that "if an employee went to union meetings it would result in that person losing his or her job."

#### 5. Other conversations involving McEldery

Georgia Buchanan, another of the General Counsel's witnesses and, as previously indicated, an LPN formerly employed by Respondent during 1978 and until approximately March or April 1979, testified that a few days before the election held by the Board on February 26, 1979, while standing with Sarah McEldery and Mary Johnson, a nurses aide, she heard McEldery say that after the election was over "she would make it tougher on the girls because she was tired of the union talk and this going on." McEldery denied making this statement. However she did testify that she may have talked to Mary Johnson about the union activity at the nursing home since according to McEldery, Johnson was "very much against" the Union.

Mary Johnson, called as a witness by Respondent, testified that while she discussed the union with Sarah McEldery on several occasions it was done privately, "just between her and me" and never around other employees. She denied having discussed the union organizing drive with McEldery in the "med room" and in the presence of Georgia Buchanan at any time in or about February 24, 1979. She related that Wanda Longie had asked her to sign a union designation card but she refused to do so.

Diana Winstead,<sup>20</sup> employed by Respondent as an "afternoon cook," testified that sometime in mid-December 1978 during the afternoon while she was in the employees' "breakroom" she overheard Sarah McEldery telling approximately 10 LPNs and nurses aides that "if they signed any of the union cards they could get fired. And that's all I can remember right now." She added that McEldery also said, "the union couldn't do any good anyway, it couldn't help matters out."<sup>21</sup> Winstead continued that a week or two after this she heard McEldery telling a group of "four or five" of the "kitchen help" in the breakroom, that Wanda Longie was a "good worker" and McEldery wished that she didn't have anything to do with the union because she hated to lay her off and stuff, because she was really good with patients.<sup>22</sup> She related that McEldery had on "two or three different" occasions prior to this stated that Longie was "really a good aide and good with the patients."<sup>23</sup>

McEldery denied that she ever told anyone that "it would be best not to have Wanda Longie around." She also denied telling employees in the "breakroom" at the nursing home that employees could get fired for signing union authorization cards.<sup>24</sup> However McEldery did

<sup>20</sup> Winstead testified on behalf of the General Counsel and was still in the Respondent's employ at the time she testified.

<sup>21</sup> Winstead named Dodie Roberts, Connie Thompson, and Verna Baker as being present at the time McEldery made these statements to employees in the break room in mid-December 1978.

<sup>22</sup> Winstead testified that present were Linda Corman, Margaret, "maybe Erma" and herself.

<sup>23</sup> Winstead recalled that one of these times occurred "around Thanksgiving of 1978."

<sup>24</sup> Through inadvertence or otherwise the question posed to McEldery by counsel for Respondent to elicit this answer indicated a date of mid-February 1979. However Winstead, as set forth above, testified that McEldery had made this statement in mid-December 1978.

admit that Longie was an "excellent aide" and a good and dependable worker.

The General Counsel also proffered the testimony of Patricia Wehri, a nurses aide employed by Respondent from approximately October 1978 until the first week in April 1979 when she voluntarily left Respondent's employ. She testified that during the first week in February 1979, in the afternoon, McEldery spoke to a group of employees in the hallway of the nursing home.<sup>25</sup> Wehri continued,

Well, when I approached the group they were already talking and they were talking about all the union activity which was going on, which was a common topic those days . . . Well, Sally [McEldery] said that she wished that we could work out our problems without having a union election and that after the union came in there would be no chance of solving our problems with a third party. And she said there were just a few that were causing all the trouble and that if it would be up to her, she would fire the whole bunch of them. And then we went on to talk about wages and it just went to the effect that, you know, if we wanted higher wages we should apply at Safeway. And then she went on to ask if we had signed any authorization cards that were floating around at that time. And she asked if we had signed any and the other girls said no but I told her that I had. And she said I shouldn't have done that because now I was committed to vote for the union when the election came up. And after that I walked away because I was pretty upset. I was really confused.

McEldery denied telling employees at "the end of January" 1979 that she "would like to fire employees who were causing trouble." She also denied asking any employees if they had signed union authorization cards.

#### 6. Conversations between Winstead and Nelson

Diana Winstead, a kitchen employee, testified that about the end of January or the beginning of February 1979 she heard Margaret Nelson, the kitchen supervisor, telling "four or five" employees in the breakroom at "around lunchtime" that Wanda Longie's failure to be placed on the work roster for February 1979 "served her right because she was just stirring up the problem about the union and stuff."<sup>26</sup> Winstead added that Nelson also stated, "the same thing should happen to Sheila Shepherd because she is just keeping it going. She said she was a troublemaker."<sup>27</sup>

Winstead continued that "a couple of weeks" prior to the election held on February 26, 1979, she had a conversation with Nelson "in the pantry" about 11 a.m. concerning her "three month evaluation" at which time Winstead asked Nelson if the election would be held at

the nursing home or elsewhere to which Nelson answered that it would be held at the nursing home. According to Winstead, Nelson then added that "she would make it hard on the girls in the kitchen—not hard, but just make us work all the time and we were there except for our breaks and our lunch hour . . . if the union was brought in." She stated that Nelson told her that if she ever said anything about this to anyone else Nelson would deny it. Winstead also related that a few days before the election Bakke appeared at the nursing home "with his lawyer" and at lunchtime of that same day Nelson asked her if she had signed a "union card" to which Winstead responded "no," although Winstead had actually done so.

Margaret Nelson, Respondent's dietary supervisor,<sup>28</sup> testified that she first became aware of the Union's organizational campaign at the nursing home "sometime in December" 1978. While Nelson stated that she expressed her views about the Union to fellow employees she denied having said that "it would serve Wanda Longie right that Respondent had not put her on the schedule because she was stirring up the union." She continued that the subject about Longie "being dropped from the schedule" was brought up by Linda Corman, an employee at a conversation among kitchen employees on or about February 1, 1979, but Nelson denied making the above remarks about Longie. Nelson also denied saying in this same conversation that Respondent should do the same thing to Sheila Shepherd because Shepherd was a "troublemaker" like Longie. She added that Sheila Shepherd's name was not discussed at all in this conversation.<sup>29</sup>

Nelson also denied telling employees in mid-February 1979 that if the Union won the election she would make it "real tough on everyone." However she did testify that this conversation had to do with dietary staff and problems that Nelson was having and "I told them that if the employee manual and the job descriptions were enforced in full that it could get a lot rougher to work there than it was—not tough, rough . . . I never mentioned the union." Nelson also denied ever asking any employees at any time whether they had signed union authorization cards including Diana Winstead.

Additionally Nelson related that "a couple of weeks before the election" she had a conversation with Diana Winstead in the pantry of the nursing home during which Winstead's work performance evaluation was discussed. Nelson denied that she had told Winstead that if the Union got in she would make it hard on everyone in the kitchen.<sup>30</sup>

<sup>25</sup> Nelson was called as a witness by the Respondent. At the time of the hearing she had been dietary supervisor for "One year and a half" having been previously employed by Respondent "as an aide and as a cook."

<sup>26</sup> Nelson testified that there were four persons present during this conversation in the nursing home's kitchen. As appears from the evidence, three of these were Nelson herself, Linda Corman, and Diana Winstead.

<sup>27</sup> Interestingly, when Nelson denied this she also stated,

The other employees in the kitchen could tell you. Unfortunately they are all out of town and on vacations. The ones that were working there at the time will tell you I had never threatened anybody's

*Continued*

<sup>28</sup> Wehri named Virginia Karr, Connie Thompson, Liz Windsor, and herself all nurses aides as being present and also Dorothy, an LPN.

<sup>29</sup> The evidence herein shows that the schedule detailing the work hours of employees is posted at the nursing home for the use of all the Respondent's employees.

<sup>30</sup> Winstead named Linda Corman as among those present during the conversation.

During cross-examination Nelson testified that discussions concerning the Union were "fairly prevalent" at the nursing home prior to the election and that she was a party to or at least overheard some of these discussions to some extent. She stated that this was true "up until January 10th. At that point we were told not to discuss it anymore. I asked my girls not to discuss union anymore after that."<sup>31</sup> Nelson continued that Montrose had told her, McEldery, and the activity director that after January 10, 1979, "there was to be no more discussion about the union. I believe it was two weeks before the election or whatever." Nelson added that Montrose had specifically said "we were not to discuss it with the employees, so I took it to mean that the supervisors should not discuss it anymore."

Nelson related that she told each kitchen employee individually, in substance, not to discuss the Union at work, "And after this we just don't talk about it, you know. By then—make up their minds that that doesn't need to be talked about in here anymore." Her testimony continues:

Q. All right. And did you tell them—did you give them any idea what would happen if they did discuss it. Did you tell them they could be disciplined?

A. No, because as far as I knew I don't know what would happen. I was told that this was the date to cut it off and that was that.

She also stated that she would thereafter hear "little things, you know, maybe a joke about it, things like this, but no in depth general arguments or discussions at all."<sup>32</sup> Nelson added that on one occasion when she overheard the kitchen employees discussing the Union after January 10, 1979, she did nothing about it but when they observed her presence they discontinued their discussion.

Diana Winstead testified that in February 1979, approximately 2 or 3 weeks before the election while in the kitchen she was singing a "union song," she had heard on the radio and Nelson came over to her and "she just told me she wished I wouldn't sing that, that she didn't want any talk about the union in the kitchen." Winstead

job or threatened to make it hard on anybody. They all worked there all during this period.

However, Respondent did not request a continuance in order to call these other employees nor did any of the employees that were present testify except for Diana Winstead.

<sup>31</sup> Nelson said that this included all of the kitchen help, three cooks, three dishwashers, and two hostesses.

<sup>32</sup> The General Counsel moved to amend the consolidated complaint at the hearing to allege that the above action by Respondent in directing its employees not to discuss the Union after January 10, 1979, was violative of Sec. 8(a)(1) of the Act. Nelson was present in the hearing room when this happened and after the complaint was amended Nelson then testified on her redirect examination that she told the employees that she was told not to discuss the Union with them and "would they please not talk about the Union and that with me, in front of me, you know because its hard in a small group where we work three together probably on a shift that if the two of them are talking union I'm going to hear them, and I was asked or told, requested, not to discuss it any further past that date." She then denied having told the employees not to discuss the Union among themselves.

stated that she "just shut up. I didn't say anything more."

#### 7. The union bumper sticker incident

Shepherd also testified that on February 23, 1979, just prior to the election held by the Board on February 26, 1979, she had a conversation with George Montrose in the hallway of the nursing home's new wing during which Montrose accused Shepherd of having placed a union bumper sticker<sup>33</sup> on his automobile and demanded that she remove it. Shepherd stated that she denied having placed the bumper sticker on his car and refused to "take it off." She related that Montrose then asked her, "What time do you take your lunch break?" and she responded, "at 7:00." Shepherd continued that at 7 o'clock while she was in the "break room" Montrose appeared and told her, "I know you put the bumper sticker on my Scout, and I want you to go out there right now and take it off my vehicle." According to Shepherd she told Montrose that she wanted to finish her lunch and that "This really isn't the time to talk about that." She added that when Montrose continued to demand that she remove the bumper sticker from his car she left the room and "went into the med room to go ahead and set up my pills for the night."<sup>34</sup>

Shepherd continued that shortly thereafter Montrose came to the "medicine room" and asked her to come to his office which she did. She stated that he again accused her of placing the bumper sticker on his car and told her to remove it there and then. Shepherd testified that she continued to deny placing the bumper sticker on Montrose's vehicle and Montrose then asked her for the name and telephone number of the person who did it so that Montrose could call that person to remove the sticker. After Shepherd refused to give Montrose that information she left his office.<sup>35</sup>

George Montrose testified that Shepherd's account of what transpired "was pretty much the way it happened." He added that he was sure that Shepherd had placed the union bumper sticker on his car because he had noticed several bumper stickers and the "backings from already used stickers on the seat of Shepherd's car when he was in the parking lot. Montrose stated that he asked Shepherd to remove the bumper sticker from his car which Shepherd refused to do. He related that he then "went home and had dinner and came back when she was on break and asked her again if she would remove the bumper sticker," which Shepherd again refused to do. According to Montrose, "during a later meeting in my

<sup>33</sup> The union bumper sticker has imprinted thereon the letters "AFSCME."

<sup>34</sup> Shepherd testified that one other person was present when this happened and that "we could tell he [Montrose] had been drinking . . ."

<sup>35</sup> Shepherd testified that Montrose said, "Well, if you didn't then you know who did and I want their telephone number." Montrose confirmed that Shepherd did say "that she knew who put it on there." On cross-examination Shepherd testified that she had placed union bumper stickers on several cars including those of George Montrose and Sarah McEldery.

office, she did say that she knew who put it on there and I asked her if she would tell me and she said no."<sup>36</sup>

#### 8. What additionally occurred

Bakke testified that after Respondent became aware of "rumors in Dillon relative to union activity" he communicated to George Montrose, Respondent's administrator at the nursing home, information and materials concerning supervisors and their obligations and rights under the National Labor Relations Act.<sup>37</sup>

Montrose testified that he did in fact receive information in the mail from Bakke concerning "what supervisors can and cannot do with regard to union organization drive," in the latter part of December 1978 or first part of January 1979.<sup>38</sup> He stated that he read this material and met with Sarah McEldery and Margaret Nelson in his office "on at least two occasions" to discuss it among themselves.<sup>39</sup> Montrose related that in spite of his having read "those bulletins, or even the subsequent ones" sent to him, he was confused and had many questions remaining in his own mind about the material which remained unanswered. Montrose continued,

I think the point they were trying to make clear to everybody though that was that you can't threaten, you can't terminate people . . . you can't do anything detrimental because of their union activity. I think that is the point we were all discussing and all trying to make.

Montrose testified that he never instructed any supervisor to talk to employees concerning their union activities stating: "I don't think we did specifically, although I think we did discuss, you know, wished we could find out what was going on, what the problems were." Montrose continued that aside from his conversation with Wanda Longie in late December 1978 or January 1979 about this he also discussed union organizing activities with other employees "on a couple of occasions." He mentioned Georgia Buchanan, "the only one I can think of off hand, I think there were a couple of others but I don't remember who they were."<sup>40</sup> He added that,

Just generally the purpose for my discussion was to find out what the problems were and what—why—as I said before we did not have any previous griev-

<sup>36</sup> Montrose admitted having a drink at dinner time but denied that he was intoxicated at the time he spoke to Shepherd.

<sup>37</sup> See Resp. Exhs. 2 and 3 in evidence.

<sup>38</sup> Montrose identified Resp. Exhs. 2 and 3 as being "the things" he received in the mail.

<sup>39</sup> McEldery testified that she discussed with Montrose "what supervisors could or could not do, many times . . . after we received some information . . . after the 10th or 12th [of] January." She stated that she was given the material by Montrose which she read. She identified Resp. Exh. 3 as being read by her but she was unsure as to Resp. Exh. 2. Margaret Nelson testified similarly.

<sup>40</sup> Montrose testified that these conversations occurred prior to the election and "in early January 1979," and took place in his office. While Buchanan testified as previously set forth herein, about a conversation she had with Montrose in August 1978 wherein Montrose asked her about her union activities, she made no mention of this later conversation with Montrose in early January 1979. However, Montrose generally seemed unsure of when he had these various conversations with the employees.

ances from anybody and I think that we felt we were always open to grievances but we hadn't heard any specifically. And it was just a little puzzling and we were trying to find out what the problem was.

Montrose related that Respondent has a "policy manual" which Respondent's employees are required to read and while "it is changed periodically, in its present form it was probably issued in June, 1978." While Montrose was unsure whether the June 1978 "policy manual" stated anything about grievances, he did testify that, "I'd have to look at it specifically. I think there is a section on a grievance procedure."

#### 9. The termination of Wanda Longie

As set forth above, Wanda Longie voluntarily changed the nature of her employment with Respondent from full-time work during 1977 to part-time work commencing in 1978. Longie testified that during the last several months of her employment with Respondent at the Parkview Acres Convalescent Center she worked part time on the day shift and at times in the afternoons, from 2 to 10 p.m., 2 or 3 days a week, and "I would fill in where they needed me." She stated that during the period she was working on a part-time basis in 1978, McEldery regularly, "maybe once a month or so," asked Longie if she would return to full-time work as an aide because she was a good worker and Respondent needed her.<sup>41</sup> Longie added that "I just didn't need the money right then" so she declined to do so. Longie continued that "around the 1st of December" 1978 she told McEldery that she would like to return to full-time work starting in January 1979. According to Longie, McEldery seemed happy about this and told her that it would be "okay."<sup>42</sup>

Longie related that toward the end of December 1978 she was ill with tonsillitis and on or about January "1st, 2nd or 3rd" she telephoned McEldery and told her that she had recovered from her illness and asked to be placed on full-time work status.<sup>43</sup> Longie testified that McEldery "didn't seem as happy this time and she said she had hired a few new aides and that I would have to wait my turn to come back, and she didn't need anybody right then."<sup>44</sup> Longie continued that she only worked 5 days during the month of January 1979.

Longie testified that on the evening of February 1, 1979, she called the Parkview Acres Convalescent Center and spoke to Georgia Buchanan, the LPN on duty at the time, asking her "to check the schedule to

<sup>41</sup> Longie testified that after McEldery had spoken to her about her union activity the first time in August 1978, no change occurred in her work schedule between that time in August and December 1978, she continued to work 2 or 3 days a week, or "when they needed me I'd fill in."

<sup>42</sup> Longie also testified that during the latter half of December 1978 she requested additional hours of work from McEldery and that McEldery assigned her extra worktime.

<sup>43</sup> In her affidavit to a Board agent Longie stated that it was on January 4 or 5, 1979, that she called McEldery for full-time work.

<sup>44</sup> However, Longie also testified that McEldery had told her that Respondent did need somebody for the next day, a Saturday, but Longie could not come in to work that day. Longie then stated, "I called on Friday and I came in on Saturday."

see when I was supposed to come in." Buchanan told her that "your name isn't even on the schedule." Longie related that she then telephoned McEldery that evening at her home and,

I asked her why I wasn't put on the schedule and she said she was going to have to take a cut in staff due to low patient count or something to do with State and Federal funding of the rest home. And I asked, "Well, who is going to be laid off?" She said she didn't know at the time, that she was going to have a meeting with George [Montrose] and Del [Bakke] so they could decide who was going to be laid off. And I said, "Doesn't seniority have anything to do with it?" And she said, "It is going to work on who is dependable and who isn't."

Longie added that McEldery did not tell her at the time that she was going to be laid off but instead told her "that she would get back to me on it. And she never did." Longie also testified that McEldery had said that "as soon as the patient load picked up" those employees who had been laid off would be rehired.

Longie stated that on February 9, 1979, she returned to the Parkview Acres Convalescent Center to pick up her check for work previously performed by her in January 1979 and while in the "bookkeeper's office" met George Montrose there. She continued that the following conversation between she and Montrose ensued,

I asked him if I was laid off and he said yes. I asked him why and he said "Because the patient count is too low and you have been sick and your kids have been sick." He pointed to the psoriasis on my arms, which I had for years, four or five years, it breaks out bad. Well this is the first time it ever broke out like that. And he said that as soon as the patient load picked up that I would be rehired. He said maybe in May, June, or July, whenever it picks up, and I was never contacted after that.

Longie related that her psoriasis had "flared up" on this particular occasion on or about January 1, 1979, and that while she was working for Respondent at the nursing home during the month of January 1979, her psoriasis was evident to everyone at the time. She testified that no one said anything to her about her condition or precluded her from working for Respondent during that month.

Longie recounted that during the period from July 1978 through January 1979 there were a number of occasions when she would call in to advise Respondent that she would be unable to work on a particular date. She stated that this happened approximately twice a month, "Depending on whether my kids were sick or if I was sick." Longie added that she also had trouble "once in a while" getting babysitters and would have to call in as unavailable for work. She related that she tried to give Respondent notice of this as soon as possible usually either the night before she was scheduled to work or on the morning of that workday. Longie testified that neither Montrose nor McEldery ever told her that they were unhappy with her attendance or that there was a

problem about her work habits being erratic or that she was undependable.

George Montrose, Respondent's nursing home administrator, testified that Longie was officially laid off by Respondent on February 1, 1979. He stated that she was laid off because she was "undependable in her work" and additionally because "we found ourselves slightly overstaffed at that particular point so it was a matter of terminating or laying off someone and that seemed like the most likely choice." Montrose added that the decision to lay off Longie was a "mutual decision between himself and Sarah McEldery, the nursing department director, and that the decision to do so was made "probably just a few days of her being notified, or the day she was probably notified. I don't know which day that was."

Montrose related that normally during the winter months Respondent experiences an increase in patient load or census, this being the number of patients in residence at the nursing home at the time,<sup>45</sup> but at the time of Longie's layoff the patient load had not increased but in fact, starting in December 1978, had actually gone "down slightly." Montrose testified that because of the census count Respondent decided to "decrease the staff slightly" since it was now overstaffed and Longie was chosen for layoff pursuant to this since "she was part-time and her work was very erratic and we just couldn't count on her coming when we had her scheduled."

Montrose testified that beginning in December 1978 through the latter part of January 1979, he and Bakke on various occasions discussed "hours or staffing." He related,

I don't recall specifically whether it was the differentiation there between the number of hours and the number of people. Of course, I'm not sure I would make that distinction at that time, personally. If he said to cut the number of hours I would try to do that any way possible.

Montrose continued that the decision to "cut the staff" was made by him in mid-January 1979 and that he discussed this with both Bakke and McEldery. He added that the nursing department was the only department in which staff cuts were made and that nurses aides were the only job category cut because the only "excess of hours" occurred in the "nursing aide category." While he could not recall how many nurses aides he had decided to cut he stated,

The only thing I can recall specifically is that there were a number of days on the January schedule where there were ten aides scheduled for eight hours apiece, whereas normally we would want to have about eight. And most of that was due to part-time help that was being utilized.<sup>46</sup>

<sup>45</sup> According to Montrose the staff would then be "generally increased" to handle the increase in patient load during the winter months.

<sup>46</sup> Montrose testified that eight nurses aides could take care of "anywhere from 62 to 66, 67" patients and that this was applicable to the "day shift." He added that with a patient count of 62 to 67 the "afternoon shift" would require normally "approximately six aides," with two nurses aides needed for the "night shift."

Montrose testified that he and McEldery "just decided that we should cut out some of the part-time nurse's aides" and Wanda Longie was chosen for layoff because she was a part-time employee and her ability to appear for work when needed "had been increasingly erratic over the past month or two." According to Montrose this decision was based primarily on the "fact that when she was scheduled in advance that she very often couldn't make it on those days, although they weren't a regular basis," and secondarily that she could not come to work when given "short notice" of the need for her services. Montrose added that it was also decided by McEldery and himself to cut Verna Baker because she was pregnant and had brought in "a note from her doctor saying she shouldn't lift anymore."<sup>47</sup>

Ordell Bakke, Respondent's president, testified that Respondent experienced a decrease in the number of patients at its nursing home in October 1978 and that the patient census thereafter was as follows:

<i>Date</i>	<i>Number of Patients</i>
Oct. 1, 1978	65
Oct. 17, 1978	63
End of Oct. 1978	62
Nov. 17, 1978	60
End of Nov. 1978	62
Dec. 1978	64-65
Jan. 1979	63-65
Feb. 1979	65-68
Mar. 1979	65-68
Apr. 1979	68-72
May 1979	70-72
June 1979	70-88 <sup>48</sup>

Bakke stated that "when there is a decrease in patient census we adjust staffing hours accordingly." He added that such an adjustment was made in late 1978.

Bakke continued that he conferred with George Montrose, the Respondent's administrator, sometime in December 1978, about the decreasing census and determined that "it was necessary to reduce the number of hours that we were spending on a daily basis." Bakke stated that initially the decision was made to reduce hours of work but later in December 1978 he and Montrose decided to reduce the number of staff employees. Bakke added that the question as to which employees were to be cut was not discussed, this being left to Montrose as part of his duties as administrator. However Bakke also testified,

I think there was some confusion because it was my intent only to reduce hours. As I said, if that would ultimately result in reducing staff, *per se*, that would

have been something that I would have no particular control over.

He recounted that as to the reduction of employees, he had not worked this out with Montrose.<sup>49</sup>

Sarah McEldery testified that she scheduled the hours of work of the RNs, LPNs, and nurses aides and that she prepared the following month's work schedules during the last week of the prior month<sup>50</sup> with, however, day-to-day changes she is required to make because of employee turnover, or illness, etc. She stated that the schedule is usually posted about the 30th or 31st of the previous month. McEldery added that on or about December 2, 1978, Longie requested a return to full-time work and McEldery told her, "Yes, when the times become available." She also related that she became aware in December 1978 that the employees were interested in union representation and in January 1979 that Longie was handing out union authorization cards.

McEldery testified that when Wanda Longie changed from a full-time work schedule to a part-time one McEldery scheduled Longie's days of work "around her preferences" and she and Longie would call each other to determine what days Longie could work and McEldery then prepared the work schedules accordingly.<sup>51</sup> McEldery stated, "Wanda was an excellent aide." She added,

Wanda came in and she had psoriasis quite severely all over and her children had been ill. She couldn't come in and so I told her if she wanted to come in to work again to let me know . . . I didn't hear from her, I think it was the end of January, I can't remember the exact date but after she had come in we had discussed the children and her own disease and I didn't hear from her again.

McEldery recounted that in January 1979 Longie had been scheduled for "nine or eleven days and some of those days she called off" because her children were ill or Longie was ill or Longie could not get a babysitter.<sup>52</sup> She added that Longie "couldn't come in" to work on various scheduled workdays "several times" a month since March 1978, "The whole time she was scheduled, all the months. But with the children, this is something that happens when you have children. I never thought much of it." McEldery testified that it is not unusual for employees to call in and report that they will not appear for work because of illness either of themselves or their children, or because of their inability to obtain a babysitter and "This happens every day."<sup>53</sup> McEldery contin-

<sup>49</sup> Bakke also testified that as patient census increases, more staff would usually be added as required.

<sup>50</sup> Longie testified similarly about this.

<sup>51</sup> Longie testified that McEldery would usually call her and they would then "mutually agree" as to what days Respondent needed Longie and as to those days that Longie could come in to work.

<sup>52</sup> According to the work schedules in evidence as Resp. Exhs. 4(a-r), and McEldery's testimony thereon, Longie was scheduled for 15 shifts in December 1978 and did not appear for four of these and in January 1979 was out two out of seven scheduled work shifts.

<sup>53</sup> McEldery testified that she does not keep a written record of the number of excuses or calls an employee makes because of "sickness or babysitting or whatever." According to McEldery employees are supposed to list this on their own timecards.

<sup>47</sup> Verna Baker, a nurses aide and a witness for the General Counsel, testified that she worked for Respondent for approximately 6 months until she was laid off on February 5, 1979. Baker related that her supervisor, Sarah McEldery, called her that morning and told her that Respondent "was short on help on lifting patients" and since Baker was pregnant and had presented Respondent with a doctor's statement that she should not do any lifting, she was going to be laid off so that Respondent could hire "somebody that could lift."

<sup>48</sup> See Resp. Exhs. 1(a)-1(j).

ued that she did not fire Longie but just stopped scheduling her in February because she "got tired of adjusting the schedule around her preferences and because [Respondent] didn't need her." However she also testified that at this time Respondent was shorthanded and in January and February 1979 had hired several new nurses aides in training.<sup>54</sup> McEldery related that Respondent's employment manual requires employees to give advance notice if they quit their jobs<sup>55</sup> whereupon Respondent places advertisements in newspapers for replacement employees. She further indicated that Respondent has a "running ad" in the newspapers and applications for employment are received continuously.<sup>56</sup>

Significantly and concerning her previous testimony to the effect that Longie was not recalled for work because Respondent was "overstaffed," McEldery testified on cross-examination after reviewing the work schedules in evidence (Resp. Exhs. 4(a-r)) that the nurses' department was,

Not overstaffed. I have never been actually what you call overstaffed. I might be overstaffed on one day or two days out of a week, but I try to maintain an eight aide day for daytimes.

She stated that there would be "six aides for the afternoon." McEldery added that there were a few days in November and December 1978 and January 1979 when she may have been overstaffed, "that is have more than eight nurses aides on the day shift."<sup>57</sup>

McEldery continued that she and Montrose discussed staff cuts in either December 1978 or January 1979. However she further stated,

We never discussed Wanda ever being cut from the staff and we were overstaffed . . . . We had discussed her part-time status and her asking me to call her or she'd call me to work in the months of December, January, and February . . . . We did not cut anyone because some of them had quit. Some didn't show up, but we kept what we had . . . . I didn't put her on because I was not contacted by her, and when I did try once in January no one answered the phone, therefore, I did not put her on.

<sup>54</sup> Pat Carrick (Jan. 15, 1979); Stephanie Damon (Jan. 17, 1979); Joe Lynn Haydon (Jan. 25, 1979); Terri Rooley (returned from maternity leave Jan. 15, 1979); Lori Nichols (Jan. 30, 1979); Eugene Burwelt (a student reemployed after a prior resignation on Jan. 9, 1979); and Veronica Rebich (transferred from housekeeping to a nurses aide position on Feb. 28, 1979). According to McEldery, Burwelt was a college student and she prepared his work schedule around his class schedule. McEldery testified that it requires 2 weeks of training for a newly hired employee without any experience to become a "good" nurses aide. The starting salary for nurses aides is \$3.05 per hour.

<sup>55</sup> Temporary employees—1 week's notice; permanent employees—2 weeks, and professionals—1 month.

<sup>56</sup> See Resp. Exhs. 5(a-e) which show advertisements for nurses aides placed by the Respondent in Tribune Examiner, a "local Dillon newspaper" from March 1979 forward.

<sup>57</sup> McEldery testified that based on the census in January 1979 Respondent had days on which more nurses aides were scheduled than 8 but that only on January 23, 1979, on which she scheduled 10 aides but 9 appeared was Respondent actually "overstaffed." She stated "The rest of that month there were generally nine scheduled and eight showed up on some days and seven on another."

McEldery recounted that she decided not to include Longie in the work schedule for February 1979 and since she did not again hear from Longie and actually had sufficient and adequate staffing thereafter, since February 1979, she never recalled Longie asserting, "I haven't thought about her particularly."<sup>58</sup>

It should be noted that concerning Wanda Longie's failure to appear on scheduled workdays for "whatever reasons" the parties herein stipulated as follows:

Month	No. of Days Scheduled	Absences
May 1978	14	2
June 1978	14	0
July 1978	9	1
Aug. 1978	6	1
Sept. 1978	6	2
Oct. 1978	12	3
Nov. 1978	10	2
Dec. 1978	15	4
Jan. 1979	7	2

#### 10. Changes in the working conditions of Sheila Shepherd

Sheila Shepherd testified that she generally worked on the 3 to 11 p.m. afternoon shift at Respondent's nursing home. However, according to Shepherd on or about February 1979 she now found that she was working alone for the entire length of that shift although previously there had been another LPN working along with her from 5 to 10 p.m. She related that this caused her to often miss "lunch" and her two 15-minute break periods while carrying the full burden of patient care herself, "I just can't take care of the people like I want to." Where there were nurses aides also working during her shifts she explained that there are various duties that only an LPN can perform and no nurses aide can assist her with these.<sup>59</sup> Shepherd added that for several months prior to February 1979 she had worked alone a total of "maybe four or five [times]. Not very many," but in the month of February 1979 she worked alone "maybe seven times approximately."

Shepherd stated that in February or March 1979 she also experienced a change in her shift scheduling, "I was scheduled for a lot of 5 to 10 shifts." She testified that

<sup>58</sup> McEldery testified that Respondent hired the following nurses aides since February 1979: Pat Carrick, Lori Nichols, and Veronica Rebich (from housekeeping) February 1979; Mittie Quick, Tiller, and McKnight in March 1979; Vinnedge, Tessitore, Pratt, and Smith in April 1979; Doely, Proulx, Guinard (from housekeeping), Miller, Hulet, Smith, and Johnson in May 1979; Graham, Young, McMullin (from housekeeping), Kilbride, Winters, Strutz, and Edwards thereafter. McEldery also acknowledged that there is a continually large turnover in nurses aides at the nursing home.

<sup>59</sup> She testified that some of these duties are "setting up and passing medications, injections, handling the oxygen equipment, any special treatments, taking doctors' orders, being responsible for any accidents or the girls that come on, if they need to leave, if they're sick, or—." She stated that under state law some of these duties cannot be performed by nurses aides.

during the previous month she had been working for the Respondent she was usually scheduled accordingly, "two 3:00 to 11:00 shifts, two 11:00 to 7:00 shifts, and I was off two days" and seldom was she scheduled for the 5 to 10 p.m. shift. Shepherd added that this latter shift is a less desirable one since "I have to get my little girl ready for the babysitter and taking her and the hassle of getting to work, going home, and everything. I lose three hours of pay, you know, and as long as I'm there I'd just as soon work ten hours because five hours is just not enough."<sup>60</sup> She also related that in effect the babysitter costs were also higher since she had to pay the same amount for 5 hours as she paid the babysitter for 8 hours.

Shepherd continued that in November or December 1978 she wrote to Respondent advising that she would no longer work the graveyard shift (11 p.m. to 7 a.m.) which she had been doing previously to accommodate Respondent's needs at the nursing home. Shepherd recounted that in or about this time Respondent also hired another LPN, Diane Hesch "to take my place, the two 3:00 to 11:00 shifts and the two 11:00 to 7:00 shifts," and then Respondent's administrator, George Montrose, gave her notice that she would be terminated.<sup>61</sup> Shepherd testified that she spoke to McEldery who told her she knew nothing about Shepherd's discharge and that Shepherd should continue working since "George didn't have the say so and fired me."<sup>62</sup> She added that after this she worked only one or two 11 p.m. to 7 a.m. graveyard shifts at the end of December 1978.

Shepherd testified that at the end of December 1978 she asked McEldery for permission to attend an emergency medical training class given on Tuesdays and Thursdays, 7 to 10 p.m., from January to April 1979, which was granted. She stated that this occurred during and about the same time that McEldery spoke to her about the Union. Shepherd added that McEldery changed her working hours to "3:00 to 11:00's, and then there was some 5:00 to 10:00's," to accommodate her "EMT" course hours.<sup>63</sup>

Shepherd also testified that prior to February 1979 she had asked McEldery for additional hours of work and that in January 1979 she did receive some additional hours. However, according to Shepherd her hours of work actually slightly decreased in February or March 1979 but went back to normal in April 1979 and thereafter. Shepherd added that when she requested the additional worktime from McEldery she asked for "an extra day in addition to the 3:00 to 11:00 p.m. shifts I was

<sup>60</sup> On cross-examination Shepherd testified, "It was in March that I had so many 5:00 to 10:00's."

<sup>61</sup> McEldery testified that Respondent would have hired Hesch "anyway."

<sup>62</sup> Shepherd testified that she missed no time from work because of her termination by Montrose. McEldery testified that Shepherd had called her at her home and told her that Montrose had fired her. McEldery stated, "I told her I would see what I could do about it, I needed nurses desperately, that I would go talk to George and see if he could keep her on, if not full-time, part-time, at that particular point." Shepherd was kept on as an employee as the record discloses.

<sup>63</sup> Shepherd testified that her scheduling on the 5 to 10 p.m. shift resulted in no change in total hours worked at any of the times referred to above since she worked additional days to make up the difference in the hours.

scheduled for," or some "extra 5:00 to 10:00" shifts but "Not a 5:00 to 10:00 in place of a 3:00 to 11:00."<sup>64</sup>

Georgia Buchanan testified that when she was employed as an LPN by Respondent she "started out on the graveyard shift [11 p.m. to 7 p.m.]. I worked the 3:00 to 11:00 quite awhile and I was on day shift before I quit." Buchanan related that when she worked on the 3 to 11 p.m. shift there usually was another LPN "on with [her] from 5:00 to 10:00." She also testified that it wasn't often that she had to work a full 3 to 11 p.m. shift alone, "I worked maybe one, possibly two during the month," and that when she did work alone it was a "hardship." Buchanan described this hardship as follows:

Well, there's two nurse's stations. I don't know exactly how far apart they are, but the new wing is, I don't know, approximately forty some patients. The old wing has twenty some and you have to set up [medication], and if there's anybody sick on either side you have to go back and forth, or if you have aides that are not responsible enough you have to be sure they are doing their work, too, and you have to take doctors' orders and any phone calls that come in on the afternoon shift. You're responsible to take care of that too. At one time I worked an afternoon shift and there's one suction machine. I was going back and forth to two patients that were very sick."

Sarah McEldery as the Respondent's witness testified that when the "patient load" reaches 68 or more patients Respondent would seek to staff the nursing home as follows: two LPNs on the day shift (7 a.m. to 3 p.m.); one full-time LPN (3 p.m. to 11 p.m.) and one part-time LPN (5 p.m. to 10 p.m. on the afternoon (swing) shift (3 p.m. to 11 p.m.); and one LPN (11 p.m. to 7 a.m.) on the night or "graveyard shift." She stated that in 1978 there was usually only one LPN on duty during the afternoon shift.<sup>65</sup> McEldery added that in November 1978 Respondent commenced scheduling one full-time (3 to 11 p.m.) and one part-time LPN (5 to 10 p.m.) during the afternoon shift.<sup>66</sup>

McEldery continued that in December 1978 Shepherd wrote to Respondent advising that she could no longer work the night shift (11 p.m. to 7 a.m.). According to McEldery at that time Shepherd was the regular afternoon shift LPN (3 to 11 p.m.). Melanie Carr was the part-time LPN on the afternoon shift and only worked from 5 to 10 p.m. and Diane Hesch, another LPN hired December 11, 1978, alternated between the 3 to 11 p.m. and 11 p.m. to 7 a.m. shifts.

McEldery explained with regard to Shepherd's having to work alone on the afternoon (swing shift),

<sup>64</sup> On rebuttal Shepherd testified that she worked "approximately the same" number of 3-to-11 p.m. shifts in January 1979 as she did in the prior month, December 1978.

<sup>65</sup> I presume that this was due to the unavailability of an LPN to work the 5 p.m. to 10 p.m. shift.

<sup>66</sup> McEldery named Melanie Carr as the part-time LPN hired on October 31, 1978. The evidence herein tends to support this part of McEldery's testimony.

It is because due to the fact Diane Hesch had to fill in for the 11:00 to 7:00 girl, which Sheila had refused to work, and still cover for 3:00 to 11:00, this would put her—I didn't adjust her schedule to fit into the time Sheila wanted off. So this is how she just unfortunately fell into covering those shifts by herself.

McEldery continued that Shepherd was scheduled for the 5 to 10 p.m. shifts on several occasions in March 1979,

Because those happened to fall on the days that Diane Hesch was working 3 to 11 with her four days and this was extra help because, I can't say for sure, but we still haven't got two 3:00 to 11:00—it was just a census thing again, when the census came up we could have the one full-time and one part-time. And Diane had been hired then for this full-time shift of 3:00 to 11:00 and 11:00 to 7:00.<sup>67</sup>

Concerning the scheduling of LPNs at the nursing home the record herein reflects that for the most part from July through October 1978 the LPN working on the afternoon 3 to 11 p.m. shift worked alone and this only changed after the hire of Melanie Carr as a part-time LPN to work the 5 to 10 p.m. shift.<sup>68</sup> Further, the parties stipulated that Sheila Shepherd was scheduled and worked the following number of 5 to 10 p.m. shifts monthly:

Months	No. of Shifts (5 to 10 p.m.)
Sept. 1978	0
Oct. 1978	0
Nov. 1978	0
Dec. 1978	4 plus 1 (5:30 to 8:30 p.m. shift)
Jan. 1979	0
Feb. 1979	0
Mar. 1979	8
Apr. 1979	4
May 1979	1
June 1979	0

<sup>67</sup> McEldery also testified, "... March for instance, she got at least four days of 3:00 to 11:00 in there. She wanted all the time she could get, the extra time, and this is why she worked some extra 5:00 to 10:00's. There were also times she wanted on weekends, certain times so she could go skiing, which we worked around and gave her also." Shepherd denied ever requesting time off to go skiing.

<sup>68</sup> See Resp. Exhs. 4(a-r). Also see Resp. Exh. 5 which reflects the following information concerning Shepherd.

Month	3-to-11 p.m. Shifts Worked	Shifts Worked Alone
Nov. 1978	12	3
Dec. 1978	11	3
Jan. 1979	16	0
Feb. 1979	17	6
Mar. 1979	13	9
Apr. 1979	10	4
May 1979	20	10

#### D. Interference, Restraint, and Coercion

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

##### 1. Threats and warnings

The consolidated complaint herein alleges that Respondent threatened and warned its employees that they would be discharged, that a projected wage increase would be delayed, and that their working conditions would be made "tougher" if they became or remained members of the Union, or gave any assistance or support to it, all in violation of Section 8(a)(1) of the Act, which allegations Respondent denies.

##### Analysis and Conclusions

The evidence herein shows that in or about mid-December 1978, immediately upon learning of the union activities of Respondent's employees Sarah McEldery, the director of nurses,<sup>69</sup> telephoned Wanda Longie, a nurses aide and perhaps the most active of the union adherents,<sup>70</sup> and told her that the employee's attempt to secure union representation "might mess up the raise" the employees were to receive in January 1979 pursuant to a mandatory increase in the Federal minimum wage. According to Longie, McEldery also interrogated her as to her own union activities and to that of the other employees at the nursing home. While McEldery admitted that she "could have" telephoned Longie in December 1978 she denied making the above statement.<sup>71</sup>

According to the testimony of Sheila Shepherd, an LPN confirmed by the record herein as being the other most visible and prime mover among Respondent's employees in the Union's organizational campaign,<sup>72</sup> McEldery

<sup>69</sup> Importantly, as director of nurses, McEldery is the overall supervisor of LPNs and nurses aides.

<sup>70</sup> The evidence herein shows that Longie signed a union authorization card on December 12, 1978, secured the signatures of approximately 13 other unit employees on authorization cards during the period from December 12 to December 20, 1978, held various union meetings at her home, and attended other such meetings elsewhere in and around Dillon, Montana.

<sup>71</sup> While Respondent elicited testimony from McEldery that she has no authority to affect employees' wages and is never consulted by Respondent thereon this has no relevance to the issue involved. McEldery was the director of nurses, high up in Respondent's management structure and the supervisor along with the Respondent's administrator, George Montrose, who in effect ran the nursing home. There is no doubt in my mind that her statements concerning the terms and conditions of employment would seem authoritative to the employees.

<sup>72</sup> Shepherd signed a union authorization card on December 1978, obtained the signatures of 18 additional unit employees on authorization cards and attended three of the union meetings. As stated before, Longie was the other main union activist.

dery warned her sometime in late December 1978 not "to get involved with any of the union activities . . . not to go to any of the [Union] meetings, and threatened Shepherd that if she did engage in union activities she could "get into a lot of trouble 'and' you'll probably lose your job." McEldery denied that this conversation took place.

Diana Winstead, employed by Respondent as an "afternoon cook," testified that sometime in mid-December 1978 she heard McEldery warn and threaten a group of approximately 10 LPNs and nurses aides present in the employee's "breakroom" that "if they signed any of the union cards they could get fired . . . the union couldn't do any good anyway, it couldn't help matters out." Winstead also related that 1 or 2 weeks after this first conversation she heard McEldery tell "four or five" kitchen employees in the "breakroom" that Wanda Longie was a "good worker" and McEldery "wished that she didn't have anything to do with the union because she hated to lay her off and stuff, because she was really good with patients." McEldery denied warning or threatening any of Respondent's employees as alleged.

Patricia Wehri, employed by Respondent as a nurses aide from October 1978 through April 1979, testified that during the first week in February 1979 she heard McEldery tell a group of nurses aides and an LPN standing in the hallway of the nursing home that,

. . . after the union came in there would be no chance of solving our problems with a third party . . . [T]here were just a few that were causing all the trouble and that if it would be up to her, she would fire the whole bunch of them.

According to Wehri, McEldery also interrogated these employees as to whether they had signed union authorization cards. McEldery denied this.

Georgia Buchanan, an LPN employed by Respondent during 1978 through March or April 1979, testified that a few days before the Board's election held on February 26, 1979, McEldery told her and a nurses aide, Mary Johnson, that "she would make it tougher on the girls because she was tired of the union talk and all this going on." McEldery also denied saying this.

I do not credit McEldery's denials. Her testimony given herein was at times contradictory, evasive and guarded, and significantly sometimes not only contrary to other uncontroverted evidence in the record but in direct opposition to the testimony of other of Respondent's witnesses. For example, McEldery testified that one of the reasons for Wanda Longie's layoff was that Respondent was "overstaffed in February." However, when she was given an opportunity to review certain of Respondent's own records in evidence,<sup>73</sup> she changed her testimony and stated,

I have never been actually what you call over-staffed. I might be overstaffed on one day or two days out of the week but I try to maintain an eight aide day for daytimes.

<sup>73</sup> See Resp. Exhs. 4 (a-r) in evidence.

Further, McEldery denied discussing Wanda Longie's layoff with George Montrose, Respondent's administrator. She testified, "We never discussed Wanda ever being cut from the staff, and we were overstaffed. The over-staffing also is new aides . . . . We had discussed her part-time status and her asking me to call her or she'd call me to work in the months of December, January and February." Montrose however testified that the decision to lay off Longie was "a mutual decision" between him and McEldery. Additionally, McEldery's testimony concerning Longie's actual layoff was extremely evasive and in some details incredible as will be discussed hereinafter more fully. Suffice it to say at this time that McEldery gave as another reason for not scheduling Longie for work assignments in February 1979, "I haven't thought about her particularly." The record contains other examples thereof.<sup>74</sup>

In support of McEldery's denials of these statements Respondent maintains in its brief, "Why McEldery would want to do any campaigning on behalf of the Union is beyond comprehension. One would think from reading the complaint that McEldery was determined to stop the union one way or another." Exactly so. Respondent admits unequivocally that it did not want a union representing its employees. McEldery was, after George Montrose, Respondent's top management representative at the nursing home. Aside from any other considerations it is not unreasonable to believe that McEldery would support and try to further Respondent's wishes concerning the Union and the record herein unequivocally and strongly supports this not only as to her actions but in those of its other management representatives.

Moreover, with regard to the events discussed herein-after, I tend to credit the account of what occurred as given by the General Counsel's witnesses for the reasons that their testimony was generally forthright, mostly clear and unequivocal, and consistent with the other evidence present in the record while the testimony of Respondent's principal witnesses was at times contradictory, unclear, evasive, and not worthy of belief. At times Respondent's witnesses contradicted not only their own testimony given both at the hearing and in affidavits previously given to the Board during the investigative stage of this proceeding but, as indicated above, also that of each other.<sup>75</sup>

Further reinforcing my above credibility determination is the fact that some of the General Counsel's witnesses were still employed by Respondent at the time they testified herein.<sup>76</sup> As employees of Respondent, their testimony, adverse to Respondent's positions herein, was given at considerable risk of economic reprisal, including loss of employment or promotion, and it is not likely to

<sup>74</sup> McEldery also stated that Longie was not recalled to work in February 1979 primarily because she failed to contact McEldery for work scheduling and McEldery had previously already made one unsuccessful attempt to contact Longie in January 1979. Montrose testified that Longie was laid off because she was "undependable," a part-time nurses aide and Respondent was overstaffed at the time.

<sup>75</sup> See the testimony of Sarah McEldery and George Montrose.

<sup>76</sup> Diana Winstead and Sheila Shepherd.

be false.<sup>77</sup> Additionally the General Counsel's witnesses, Georgia Buchanan, Patricia Wehri, and Verna Baker, had voluntarily left Respondent's employ prior to the hearing and had no apparent reason to testify other than as to their own recollection.<sup>78</sup> It should also be noted that concerning some of the issues herein the Respondent failed to produce material witnesses under its control.<sup>79</sup> Where relevant evidence is in the control of a party and the party fails to produce it without satisfactory explanation, the trier of the facts may draw an inference that such evidence would be unfavorable to that party.<sup>80</sup>

The evidence further shows that, sometime in December 1978, George Montrose, the nursing home administrator, called Wanda Longie into his office and told her in substance that Respondent had held up a wage increase at another of its facilities because of the employees' union activities and that this could also happen at the Parkview Acres Convalescent Center.<sup>81</sup> While Montrose did not actually admit making this statement his testimony thereon was so equivocal as to create a doubt in my mind as to whether he did in fact deny this or not. Be that as it may when taken in the full context of what he additionally said in this conversation the inference of implied threat being present is inescapable, it being conveyed that continued union activity on the part of Respondent's employees could result in a delay of the projected wage increase.<sup>82</sup> It should be remembered that McEldery, director of nurses, also made such a statement which only serves to strengthen the above inference.

The Respondent in its brief asserts,

Even if these statements were made, effective January 1 the minimum wage and other wages did go up. By the time the election was held on February [26], there should have been no doubt in anyone's mind that the organization drive would not affect the minimum wage.

While I would agree with Respondent had this been the only instance of an unfair labor practice committed by it, yet in the light of Respondent's commission of other more egregious and pervasive unfair labor practices as set forth herein, this action can only be considered to add to the unlawful interference, restraint, and coercion

imposed by Respondent upon its employees in order to influence the election in its favor.

Additionally as related by Diana Winstead, Margaret Nelson, Respondent's kitchen supervisor, told several of the kitchen employees in or about the beginning of February 1979 that Respondent's failure to schedule Wanda Longie for work during February 1979 "served her right because she was just stirring up the problem about the union and stuff." Nelson also stated that "the same thing should happen to Sheila Shepherd because she is just keeping it going . . . she was a troublemaker." Winstead also related that a few weeks prior to the election Nelson told her that if the Union "was brought in" Nelson would "make us work all the time we were there except for our breaks and our lunch hour . . . ." While Nelson admitted that she had expressed her views about the Union to fellow employees she denied making any statements concerning Longie and Shepherd. Nelson did however testify that she told employees that "if the employee manual and the job descriptions were enforced in full that it could get a lot rougher to work there than it was—not tough, rough . . ." but she never mentioned the Union. For the reasons previously set forth above I credit Winstead's account of these conversations.

As stated by the Board in *General Stencils, Inc.*, 195 NLRB 1109 (1972),

A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative.

The express and implied threats and warnings made by Sarah McEldery and Margaret Nelson to Respondent's unit employees that their working conditions would be made "tougher" or "rougher" if the Union came in,<sup>83</sup> that the employees could lose their jobs if they signed union authorization cards or engaged in any other union activities,<sup>84</sup> and that employees who engaged in union activities should be fired,<sup>85</sup> the warning by McEldery that employees should not get involved in union activities,<sup>86</sup> and the threats by McEldery and George Montrose that union activity on the part of the employees could delay a scheduled wage increase<sup>87</sup> all constitute violations of Section 8(a)(1) of the Act since such statements clearly tend to coerce, intimidate, and discourage

<sup>77</sup> See *Shop-Rite Supermarket, Inc.*, 231 NLRB 500, 505 (1977); *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961).

<sup>78</sup> *Tri-County Tube, Inc.*, 194 NLRB 103, 107 (1971). I am not unaware that Mary Johnson, called as a witness for Respondent and who gave supportive testimony in its behalf, also was no longer employed by Respondent at the time she testified. However, according to McEldery, Johnson was strongly antiunion and her testimony has to be considered in that context.

<sup>79</sup> Other employees who were identified as being present during the conversations between Respondent's unit employees and Sarah McEldery or Margaret Nelson, respectively.

<sup>80</sup> *Publishers Printing Co., Inc.*, 233 NLRB 1070 (1977); *Broadmoor Lumber Company*, 227 NLRB 1123 (1977).

<sup>81</sup> Montrose testified that Longie raised the subject of the Union's organizational activities and its effect on the scheduled minimum wage increase. Longie testified that this may have been the fact but she was unsure as to actually who did initiate this topic in the conversation.

<sup>82</sup> In this conversation Montrose also questioned Longie about her union activities and that of other employees and pointedly told Longie that he did not like unions and that Respondent did not want or need a union at the nursing home.

<sup>83</sup> *La-Z-Boy Midwest, a Subsidiary of La-Z-Boy Chair Company*, 241 NLRB 334 (1979); *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977).

<sup>84</sup> *Coca-Cola Bottling Company of Miami, Inc.*, 237 NLRB 936 (1978).

<sup>85</sup> *J. P. Stevens & Co., Inc.*, 244 NLRB 407 (1979). The fact that either McEldery or Nelson may have thought she was merely expressing her views and opinions when she made her remarks about Longie and Shepherd does not exculpate those remarks from violating Sec. 8(a)(1) of the Act if in fact they were coercive and threatening in nature. The clear impact of these remarks was that McEldery and Nelson endorsed the discriminatory measures taken against Longie and wished upon Shepherd and their positions as supervisors carried with it the authority to act against their biases by implication, affecting any employees who supported the Union. See *International Paper Company, Inc.*, 228 NLRB 1137 (1977).

<sup>86</sup> *Arnold Junior Fenton, Inc.*, 240 NLRB 202 (1979).

<sup>87</sup> *Burt Wolfe Ford, et al.*, 239 NLRB 555 (1978).

employees from engaging in any protected activity under Section 7 of the Act for fear of reprisals.

## 2. Interrogation of employees concerning their union activity and support

The consolidated complaint herein alleges that Respondent interrogated its employees concerning their membership in, activities on behalf of, and sympathy in the Union in violation of Section 8(a)(1) of the Act. Respondent denies this allegation.

### Analysis and Conclusions

As the testimony of Wanda Longie shows, in or about the time she was soliciting employee signatures on union authorization cards and attending union meetings in December 1978, Sarah McEldery, director of nurses, telephoned her one evening at her home and asked Longie if she had "instigated . . . starting the union business up again" and as to how many other employees were involved in this. As set forth before McEldery, while admitting that she could have called Longie at her home in December 1978, denied that she interrogated Longie about her union activities and that of other employees. Also, according to the credible testimony of Patricia Wehri, in or about the first week in February 1979 McEldery asked a group of employees including herself if they had signed authorization cards for the Union.<sup>88</sup> McEldery denied this.

Diana Winstead testified that Margaret Nelson, her supervisor, asked her a few days before the election whether she had signed a union authorization card which Winstead denied doing. Additionally as indicated hereinbefore George Montrose admitted that in late December 1978 and in January 1979 he questioned several of Respondent's employees about their union activities, these conversations taking place in his office, including Wanda Longie, Georgia Buchanan, and "a couple of others" whose names he could not remember. While both McEldery and Nelson denied interrogating employees about their union activities, I do not credit their denials for the reasons set forth hereinbefore.

The basic premise in situations involving the questioning of employees by their employer about union activities is that such questions are inherently coercive by their very nature and therefore violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained."<sup>89</sup> However, the Board has held that in certain circumstances employees may have a legitimate purpose for making a particular inquiry of employees which may involve, to some limited extent, union conduct.<sup>90</sup> In this case Respondent offered no legitimate reason nor can I find any legitimate purpose for such interrogation or questioning of its employees other than that it was done, when considered in

the light of Respondent's other actions herein, for the purpose of coercing its employees into renouncing the Union.<sup>91</sup> The accompanying remarks made by McEldery, Nelson, and Montrose during the conversations wherein the interrogation occurred overwhelmingly support this.<sup>92</sup> Further, Respondent, while interrogating its employees, gave them no assurances against reprisals<sup>93</sup> and at least Montrose conducted the interrogation of these employees, in his office, the "locus of managerial authority."<sup>94</sup>

It should also be noted that the Respondent failed to follow the Board's *Struksnes* case guidelines<sup>95</sup> the standards by which a poll is determined to be lawful, if Respondent's actions herein were designed by it to be in actuality a poll of its employees to determine the truth of the Union's allegation of majority representation when it demanded recognition as the collective-bargaining representative of Respondent's employees in an appropriate unit. As set forth in *Struksnes*,

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) The purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Also with regard thereto, it should be noted that in response to the interrogation by Respondent's representative Nelson, employee Diana Winstead denied any involvement with the Union. The Board has held in similar circumstances that employees' denials of union involvement show the actual coercive effect of Respondent's interrogation and the fear of reprisal that acknowledgment might engender.<sup>96</sup>

<sup>91</sup> *Jefferson National Bank*, 240 NLRB 1057 (1979); *World Wide Press, Inc.*, 242 NLRB 346 (1979); *Seal Trucking Ltd.*, 237 NLRB 1091 (1978); *Franklin Property Company, Inc. d/b/a The Hilton Inn*, 232 NLRB 873 (1977).

<sup>92</sup> In their conversations with Wanda Longie, McEldery and Montrose both implied that employees' activities on behalf of the Union could lead to a delay in the employees' projected wage increase. Further, when McEldery was interrogating employees including Patricia Wehri about their union activities she also stated in that conversation that the employees who were the union activists and "were causing all the trouble" should be fired. And, it should be noted that prior to Nelson's having interrogated Diana Winstead as to whether she signed a union authorization card Nelson had made her position concerning union representation known loudly and clearly by telling the kitchen employees including Winstead that it served Longie right to have in effect been laid off and that Sheila Shepherd should have suffered the same fate, and that Nelson would make it tough on the employees under her jurisdiction if the Union got in with all the obvious implications of layoff, discharge, or reprisal for those employees who supported the Union.

<sup>93</sup> *Thermo Electric Co.*, 222 NLRB 358 (1976), *enfd.* 547 F.2d 1162 (3d Cir. 1977); *N.L.R.B. v. Cement Transport, Inc.*, 490 F.2d 1024, 1028 (6th Cir. 1974), *cert. denied* 491 U.S. 828 (1974); *Trinity Memorial Hospital of Cudahy, Inc.*, 238 NLRB 807 (1978).

<sup>94</sup> *Meehan Truck Sales, Inc.*, 201 NLRB 780, 783 (1973).

<sup>95</sup> *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967).

<sup>96</sup> *O & H Rest., Inc., trading as the Backstage Restaurant*, 232 NLRB 102 (1977).

<sup>88</sup> Wehri testified that while the other employees denied signing authorization cards she admitted having done so to McEldery.

<sup>89</sup> *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953).

<sup>90</sup> *P.B. & S. Chemical Company*, 224 NLRB 1, 2 (1976); *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770, *enforcement denied* 334 F.2d 617 (8th Cir. 1965).

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."<sup>97</sup> Applying that test I find that Respondent by interrogating its employees as set forth above, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has thereby violated Section 8(a)(1) thereof.<sup>98</sup>

Moreover, the evidence establishes that George Montrose questioned Sheila Shepherd concerning the identity of the employee who had placed a union bumper sticker on his automobile during the Union's campaign. Montrose admittedly approached Shepherd about this subject three times during her work shift on February 23, 1979. During each of these confrontations Montrose accused Shepherd of having placed the bumper sticker on his car and demanded that she remove it. The General Counsel contends that,

Montrose's questioning Shepherd about the identity [of] the person who had placed the bumper sticker on his car is equivalent [to] his asking her which employee or employees were Union supporters.

Respondent denies that this was unlawful interrogation of Shepherd asserting,

Montrose suspected, and in all likelihood rightly so, that Sheila Shepherd put the bumper sticker on his car. He insisted that she take it off and it wasn't until after numerous denials that she put it on that he asked her who did. She refused to disclose that information and left. If the incident had any impact at all, it was only on Sheila Shepherd and only to show her that people do not appreciate silly pranks when they deface their property.

Montrose's position as administrator as well as his demeanor while questioning Shepherd as appears from the evidence herein was intimidating conduct and this is illustrated by Shepherd's continued denial to him that she had placed the bumper sticker on his automobile when in fact she had. He was also well aware that Shepherd was very active in the Union's campaign to represent Respondent's employees. In view of the threats and warnings made by Respondent's representatives to its employees on various occasions concerning their union activities, it is not unreasonable to infer that Shepherd considered Montrose's actions that evening in that same light and as a continuation thereof.<sup>99</sup> It is further, on the basis of this record, not unreasonable to find that Montrose's

questioning of Shepherd about the identity of the person who placed the bumper sticker on his car was equivalent to his asking her which other employee or employees were union supporters. Acts by representatives of Respondent committed during a union organizational campaign should be considered in the context of the whole labor relations picture present at the time.

An employer's inquiries as to the union sympathies or activities of its employees has usually been the prelude to innumerable cases of discrimination and therefore any attempt by an employer to ascertain employee views and sympathies in this connection has been considered to be inherently coercive by their very nature, instilling in the minds of employees the fear of reprisals based on the information the employer has obtained.<sup>100</sup> It is axiomatic that an employer cannot discriminate against union adherents without first knowing who they are.<sup>101</sup> In view of the above such interrogation was coercive as it created the impression that Montrose was engaged in unlawful surveillance of its employees and was therefore violative of Section 8(a)(1) of the Act.<sup>102</sup>

### 3. Solicitation of grievances

The consolidated complaint alleges in substance that Respondent solicited grievances from its employees in violation of Section 8(a)(1) of the Act which allegations Respondent denies.<sup>103</sup>

### Analysis and Conclusions

Soon after Respondent learned that its employees had signed union authorization cards and were engaging in other union activities, it not only threatened and warned its employees to cease such activities on pain of reprisal and interrogated these employees as to their union sympathies and activities as set forth above, but also inquired as to the reasons therefor, thus soliciting grievances. George Montrose testified that his conversation with Wanda Longie was initiated "specifically with the idea of determining what the grievances were because we heard rumors that there were cards being circulated for the union." He continued, "And that was my specific question to Wanda, and because of the fact we weren't aware of any grievances that had been aired previously . . . what was the reason for this at this time." Montrose admitted that he asked Longie why the employees were organizing. Additionally Montrose, after stating he also discussed employees' union activities with other employees including Georgia Buchanan during late December 1978 and January 1979, admitted that the very purpose of these conversations was "to find out what the problems were and what—why—as I said before we did not have any previous grievances from anybody and I think

<sup>97</sup> *Electrical Fittings Corporation, a Subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975).

<sup>98</sup> *Jefferson National Bank*, 240 NLRB 1057 (1979); *World Wide Press, Inc.*, 242 NLRB 346 (1979); *Seal Trucking Ltd.*, 237 NLRB 1091 (1978); *Stride Rite*, 228 NLRB 224 (1977); *Franklin Property Company, Inc.*, 232 NLRB 873 (1977); *C & E Stores, Inc.*, *C & E Supervalu Division*, 221 NLRB 1321 (1976); *L.O.F. Glass, Inc.*, 216 NLRB 845 (1975); *Florida Steel Corporation*, 215 NLRB 97 (1974).

<sup>99</sup> See *Montgomery County MH/MR Emergency Service*, 239 NLRB 821 (1978). While Montrose did not actually threaten reprisals once he learned who had placed the union bumper sticker on his car the implication of threat was there.

<sup>100</sup> *Struksnes Construction Co., Inc.*, *supra*.

<sup>101</sup> *Cannon Electric Company*, 151 NLRB 2465, 1468 (1965).

<sup>102</sup> *Fremont Manufacturing Company, Inc.*, 224 NLRB 597 (1976). However this case involved employee action that was clearly protected concerted activity. Also see *Montgomery County MH/MR Emergency Service*, *supra*.

<sup>103</sup> Although alleged in the consolidated complaint as action violative of Sec. 8(a)(1) of the Act, the parties did not discuss this issue in their briefs.

that we felt we were always open to grievances but we hadn't heard any specifically. And it was just a little puzzling and we were trying to find out what the problem was." The credited testimony of Wanda Longie also shows that Sarah McEldery in effect asked her in a conversation which occurred in December 1978, after union authorization cards had been signed by Respondent's employees, why the employees were unhappy and wanted to be represented by the Union.

The solicitation of employee grievances during an organizational campaign accompanied by a promise, express or implied, that the grievances will be remedied is a violation of the Act. The essence of such a violation is not the solicitation of grievances itself, rather it is the promise to correct them, either express or *inferred from the solicitation itself*.<sup>104</sup> Particularly, Montrose's questioning of employees as to why they wanted the union and what their grievances were, as well as McEldery's conversation with Longie along these lines, cannot be viewed in a vacuum. It should be noted that back in August 1978 Respondent had stopped cold its employees' interest in union representation by soliciting and becoming aware of what their main grievance was, that of wages, and then remedying it by granting a wage adjustment. This lesson is not lost on the employees as evidenced by the testimony of various witnesses herein.<sup>105</sup> Respondent in December 1978 and thereafter sought to accomplish the same result again by soliciting its employees' grievances with the implication that once having solved their problems in the past it would do so again by remedying employee grievances without their need of a union.

Such conduct constitutes an unlawful restraint upon and interference with the employees' self-organizational rights guaranteed under the Act because implicit therein is the promise that benefits will be awarded to them by their employer so long as they are not represented by a labor organization and because it tends to frustrate the employee's organizational efforts by showing them that union representation is unnecessary.<sup>106</sup> Thus when Respondent, in response to the Union's organizational campaign, solicited grievances from its employees and then impliedly indicated that it would satisfy their demands, it violated Section 8(a)(1) of the Act and I so find.<sup>107</sup>

#### 4. Additional 8(a)(1) violations

During the hearing the consolidated complaint was amended to allege that Respondent in directing its employees not to discuss anything about the Union after January 10, 1979, violated Section 8(a)(1) of the Act. Respondent denied this.

<sup>104</sup> *The Stride Rite Corporation*, 228 NLRB 224 (1977); *Campbell Soup Company*, 225 NLRB 222 (1976); *Uarco Incorporated*, 216 NLRB 1 (1974).

<sup>105</sup> See the testimony of Wanda Longie, Sheila Shepherd, Georgia Buchanan, George Montrose, Sarah McEldery, and Mary Johnson.

<sup>106</sup> See *Carbonneau Industries, Inc.*, 228 NLRB 597 (1977); *Ring Metal Co.*, 198 NLRB 1020, 1021, (1972).

<sup>107</sup> *Jefferson National Bank*, 240 NLRB 1057 (1979); *McMullen Corporation d/b/a Briarwood Hilton*, 222 NLRB 986 (1976); *Teledyne Dental Products Corp.*, 210 NLRB 435 (1975); *House of Mosaics, Inc., Subsidiary of Thomas Industries, Inc.*, 215 NLRB 704 (1974). The testimony by Montrose that Respondent may have had a grievance procedure as set forth in its personnel manual does not change this.

#### Analysis and Conclusions

According to the various witnesses who testified herein discussions concerning the Union were "fairly prevalent" at the nursing home prior to the election and Margaret Nelson, the kitchen supervisor, had admittedly participated in some of these discussions with the kitchen employees and others expressing her opinions about the Union. The uncontroverted evidence herein shows that on or about January 10, 1979, Nelson instructed the kitchen employees under her supervision not to discuss the Union thereafter.<sup>108</sup>

Significantly, and as the record shows, Nelson at first testified,

A. I asked my girls not to discuss Union anymore after that.

Q. You asked your employees not to discuss the Union anymore?

A. And by then they were tired of it. They were just about through with all their talk about it . . . .

Q. And did you tell them simply just to don't discuss it here at work at all at any time, something to that effect?

A. To that effect, yes.

Q. All right.

A. And after this we just don't talk about it, you know. By then—make up their minds that that doesn't need to be talked about in here anymore.

Q. All right. And did you tell them—did you give them any idea what would happen if they did discuss it? Did you tell them they could be disciplined?

A. No, because as far as I know I don't know what would happen. I was told this was the date to cut it off and that was that.<sup>109</sup>

Subsequent to the above testimony Nelson also testified<sup>110</sup>

Q. To the best you can remember, what did you say when you told employees?

A. Oh, that I was not to discuss it with them past this date. The exact words I don't know, but I was told that I was not to discuss this with the employees, that would they please not talk about the union . . . in front of me, you know, because it's hard in a small group where we work three together probably on a shift that if the two of them are talking union I'm going to hear them, and I was asked or told, requested not to discuss it any further past that date.

<sup>108</sup> Nelson testified that she had been told by George Montrose at a supervisors' meeting that after January 10, 1979, "there was to be no more discussion about the union." However Nelson also testified that Montrose had specifically said "we were not to discuss it with the employees, so I took it to mean that the supervisors should not discuss it anymore."

<sup>109</sup> Nelson testified as set forth above on cross-examination by counsel for the General Counsel.

<sup>110</sup> This later testimony was elicited during redirect examination by counsel for Respondent.

Q. Now, this meeting with George Montrose, did he state that employees should not discuss the union or did he state that supervisors should not discuss the union?

A. I took it to mean that supervisors should not discuss it any more after that.

JUDGE KLEIMAN: What did he say?

A. He said we were not to discuss it with the employees, so I took that to mean that the supervisors should not discuss it any more.

JUDGE KLEIMAN: Did you tell them not to discuss it among themselves?

A. No, I didn't, just when I was there so that I wouldn't be in on these conversations because it's hard to stay out of them.

That Nelson's above broad direction to all the kitchen employees not to discuss the Union anymore after January 10, 1979, at the nursing home had an intimidating and coercive effect upon these employees *vis-a-vis* their protected activities is obvious from the record. Her admonition to them was at first testified to in an unequivocal and clear manner and then Nelson sought to correct her testimony somewhat after she had heard the General Counsel's motion to amend the consolidated complaint which alleged her action to be violative of the Act in an attempt to prevent such a finding. Completely refuting Nelson's subsequent testimony that she only told the employees not to discuss the Union when she was there and in strong support of the General Counsel's allegation that Nelson directed the employees to cease any and all talk about the Union at any time at Respondent's premises was the uncontradicted account by Diana Winstead of an incident which occurred just prior to the election and Nelson's own testimony as to the effect her instructions had on the employees themselves.

Winstead related that approximately 2 or 3 weeks before the election she was singing a "union song" she had heard on the radio while performing her duties in the nursing home kitchen whereupon Nelson came over and "she just told me she wished I wouldn't sing that, that she didn't want any talk about the Union in the kitchen." Winstead testified that she "just shut up. I didn't say anything more." Further Nelson testified that after she had told the kitchen employees to cease any discussion of the Union she overheard some of them talking about the Union and although she did nothing about it at the time, when the employees observed her presence they immediately discontinued their discussion.<sup>111</sup>

In view of all of the above I find and conclude that Nelson's direction to the employees not to discuss the Union while at the nursing home violated Section 8(a)(1) of the Act because it constituted conduct tending to coerce, restrain, and interfere with the free exercise of

Respondent's employees' rights guaranteed in Section 7 of the Act.<sup>112</sup>

#### E. The Unlawful Termination of Wanda Longie

Section 8(a)(3) of the Act prohibits an employer from discriminating against its employees in regard to hire, tenure, and other terms and conditions of employment for the purpose of encouraging or discouraging membership in a labor organization.

The consolidated complaint alleges that Respondent reduced the working hours of Wanda Longie in January 1979 and on or about February 9, 1979, "laid off and/or terminated" her and failed and refused to reinstate her to her former position of employment because she joined or assisted the Union and sought to bargain collectively through representatives of her own choosing and engaged in other concerted activities for the purpose of collective bargaining or mutual aid or protection, in violation of Section 8(a)(3) and (1) of the Act. Respondent denies these allegations and contends that Longie was terminated for cause.

#### Analysis and Conclusions

Under Board precedent, if part of the reason for terminating an employee is unlawful, a layoff or discharge violates the Act. As the Board and courts have so often indicated, the issue is not whether there existed grounds for layoff or discharge apart from union or protected concerted activities. That the employer has ample reason for terminating an employee is of no moment. An employer may discharge or lay off an employee for any reason, good or bad, so long as it is not for union or protected concerted activity.<sup>113</sup>

Direct evidence of a purpose to discriminate is rarely obtained, especially as employers acquire some sophistication about the rights of their employees under the Act, but such purpose may be established by circumstantial evidence inferred from the record as a whole.<sup>114</sup>

A review of the entire record herein convinces me that Wanda Longie was laid off or terminated at least in part because she signed a union authorization card and engaged in other activities on behalf of the Union and I so find.

The evidence shows that Longie had been employed by Respondent from January 1977<sup>115</sup> until her termination on February 1, 1979,<sup>116</sup> and that she performed her

<sup>112</sup> *Seligman & Associates, Inc.*, 240 NLRB 110 (1979); *D.R.C. Inc.*, 233 NLRB 1409 (1977); *Somerset Shirt and Pajama Co.*, 232 NLRB 1103 (1977); *Thermo Electric Co., Inc.*, 222 NLRB 358 (1976).

<sup>113</sup> *Jefferson National Bank, supra*; *O & H Rest., Inc., trading as the Backstage Restaurant*, 232 NLRB 1082 (1977).

<sup>114</sup> *Heath International, Inc.*, 196 NLRB 318 (1972); *Corrie Corporation v. N.L.R.B.*, 375 F.2d 149, 152 (4th Cir. 1967); *N.L.R.B. v. Newhoff Bros.*, 375 F.2d 372, 374 (5th Cir. 1967); *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966); *Hartsell Mills v. N.L.R.B.*, 111 F.2d 291, 293 (4th Cir. 1940).

<sup>115</sup> As indicated hereinbefore Longie worked full time from January 1977 until early 1978 when she requested and was granted a change to part-time status thereafter.

<sup>116</sup> The consolidated complaint alleges that Longie was laid off or terminated on February 9, 1979, and Respondent's answer admitted this. However, Montrose testified that Longie was officially laid off by Respondent on February 1, 1979.

<sup>111</sup> I cannot on the basis of the record herein credit Nelson's explanation that the employees "just stopped" their union conversation because "They were very cooperative."

work well as a nurses aide.<sup>117</sup> In fact Sarah McEldery, director of nurses and Longie's overall supervisor testified that Wanda Longie was a good and dependable worker, "an excellent aide."<sup>118</sup>

That Respondent knew in December 1978 that the Union was attempting to organize its employees is admitted. That Respondent had knowledge before her layoff that Longie was an important key figure, a main activist in the Union's organizational campaign, is obvious from the record. In addition, that Respondent entertained union animus is also clearly evidenced herein since not only did it immediately embark upon a course of action to discourage membership in and activities on behalf of the Union once it learned of the Union's involvement with its employees, as found above, but Respondent also made it abundantly clear in statements to employees made by its representatives that it disliked unions and unequivocally did not want a union representing its employees at the nursing home.<sup>119</sup> Montrose admitted this much and the credible evidence herein shows that McEldery also stated this to employees. The record also shows that Respondent's union animus was made clearly obvious to its employees by its vehement opposition to the Union. Based upon Respondent's unlawful actions during the period of the Union's organizing campaign, its union animus, and the Respondent's knowledge of Wanda Longie's active role in the Union's efforts, I am inexorably lead to the inference that Longie became marked for dismissal in order to discourage union activity or support among the Respondent's employees at the nursing home. The discharge of a leading union advocate is a most effective method of undermining a union.<sup>120</sup>

Respondent maintains that Wanda Longie was laid off on February 1, 1977, "because of her absenteeism, the number of hours aides worked had to be reduced, and there were enough other full-time aides to take care of the work even if one or two did not show up." Let us examine Respondent's contention in the light of the evidence herein.

Initially, Respondent's main witnesses Montrose and McEldery, who testified concerning the reasons for Longie's layoff, gave conflicting testimony therein which immediately casts suspicion upon these reasons. As set forth above, George Montrose testified that Longie was laid off because she was "undependable in her work" and because "we found ourselves slightly overstaffed at that particular point so it was a matter of termination or

laying off someone" and Longie was "the most likely choice." However Sarah McEldery testified that Longie was not fired but that McEldery just stopped scheduling her in February 1979 because she "got tired of adjusting the schedule around her preferences and because we didn't need her." As set forth hereinbefore, McEldery at first stated that Respondent was overstaffed in February 1979, and that this was the reason for Longie's layoff. But after reviewing Respondent's records in evidence she changed her testimony to assert that there was actually no overstaffing in January or February 1979, or really at any time except for occasional days during a week or month. McEldery then gave as the reason for Longie's layoff that Longie had failed to contact her in February 1979 for work assignments and since McEldery had already made one previous attempt to contact Longie in January 1979, although unsuccessful, and Respondent was now adequately staffed she never gave Longie any "particular" thought for rehire.<sup>121</sup>

Additionally, Respondent refers to the need to cut staff work hours and/or staff because of a decrease in patient census. However, the evidence herein shows that Respondent experienced a decrease in the number of patients resident at the nursing home in October and November 1978 and then, according to Ordell Bakke, Respondent's president, "a slight increase" in December 1978, and a continuous increase thereafter from January through May 1979, ending with a patient census at the end of June 1979 of 68 patients. Significantly, Longie was not laid off in October or November 1978 when the patient census had actually decreased but instead this was accomplished in February 1979 while the number of patients at the nursing home was on the increase or had already increased over the prior months. Significantly, another factor was now present after December 1978, which was not present during the previous months and that was the Union's organizational campaign in which Longie was a strong participant and one of the Union's staunchest supporters.

Respondent moreover asserts that Longie was an "undependable" employee because she regularly failed to appear for work although previously assigned to a work shift and that was another reason for Longie being singled out for layoff. Even assuming *arguendo* that Longie's work attendance was "increasingly erratic over the past month or two" as alleged by Respondent, the record reveals that Respondent generally accepted this during the period that Longie was working as a part-time employee from May 1978 until November 1978 without considering her for layoff or in fact bringing her alleged unsatisfactory attendance record to her attention by warning, reprimand, or otherwise. The evidence herein shows that during this period Longie failed to appear on assigned days an average of 2 days per month. I am aware that Longie failed to report for work 4 days

<sup>117</sup> Longie testified uncontradictedly that she never received any warning or was ever told that Respondent was unhappy with her work because of her attendance or that her work habits were erratic or undependable.

<sup>118</sup> Diana Winstead also testified without contradiction that McEldery had told employees on several occasions that Longie was "really a good aide and good with patients" and "a good worker."

<sup>119</sup> Of course an employer is free to dislike unions and so communicating his views to employees does not amount to an unfair labor practice. *N.L.R.B. v. Threads, Inc.*, 308 F.2d 1, 8 (4th Cir. 1962). Nevertheless, union animus is a factor which may be evaluated in ascertaining the true motive prompting the discharge of an employee. *Maphis Chapman Corp. v. N.L.R.B.*, 368 F.2d 298, 304 (4th Cir. 1966); *N.L.R.B. v. Georgia Rug Mill*, 308 F.2d 89, 91 (5th Cir. 1963).

<sup>120</sup> *N.L.R.B. v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (5th Cir. 1965).

<sup>121</sup> Note that Verna Baker, a nurses aide, testified uncontradictedly that McEldery had called her on February 5, 1979, and told her that the Respondent "was short on help on lifting patients," work normally performed by nurses aides, and because of Baker's pregnancy which precluded her from lifting patients, Baker was to be laid off. Longie had no such disability at the time.

out of 15 scheduled workdays during the month of December 1978,<sup>122</sup> but she was continued on as an employee into January 1979, and during that month her attendance returned to her presumably acceptable pattern.<sup>123</sup> Further, McEldery, Respondent's own witness, testified that Longie was a good, dependable worker, that there was a dramatic turnover in nurses aides at the nursing home, with a 2-week training period required before nurses aides could function acceptably and that nurses aides were constantly sought and advertised for by Respondent, because of the high turnover rate at the nursing home.

While it is true that Longie did "call off" on an average of 2 days per month throughout 1978, except for the month of December 1978 which was higher, it is equally true however that McEldery had been scheduling around Longie's preferences and unavailability for those months without problems. McEldery testified that she realized that Longie's occasional unavailability was "something that happens when you have children" as Longie did, and that McEldery "never thought much about it" with regard to Longie's absences. McEldery also stated that almost all her staff were women, half of whom had young children as Longie did and that it was a regular and daily occurrence for them to call in to report that they could not appear because of family obligations. Again however, there was now present an additional factor beginning in December 1978 which made Longie's previously acceptable work performance *vis-a-vis* her attendance now unacceptable, that being the employees' attempt to secure union representation and Longie's wholehearted support of this effort.

Further, according to the credited testimony herein, both Montrose and McEldery assured Longie that she would be called back when the patient load increased, even assuming *arguendo* that Respondent was overstaffed in February 1979. Respondent failed to do so even though the record shows that patient census did increase and that Respondent advertised in a local newspaper for nurses aides during this time because of its admitted need for employees in this job category due to consistently high turnover of nurses aides at the nursing home. However, again there was a factor present after December 1978 which was not there prior thereto and which now made Longie a shunned former employee and that was her active participation in the Union's organizational campaign and her continued affiliation with the Union to which Respondent was openly hostile.

As stated before I realize that "an employer may discharge an employee for good cause, or bad cause, or no cause at all . . . ."<sup>124</sup> I am also aware that the Board may not substitute its judgment for that of Respondent's management as to what constitutes proper cause for dis-

charge,<sup>125</sup> nor "interfere with the unfettered right of companies to exercise these personnel judgments."<sup>126</sup> Nevertheless, "an employer having a right to discharge employees for . . . unprotected activity may not discharge them for a discriminatory reason without violating Section 8(a)(3) of the Act."<sup>127</sup>

Since an employer may fire an employee for good cause, Longie's consistent failure to appear on certain assigned workdays during her term of employment might, *arguendo*, have constituted such cause and formed some basis for her termination. However, even where there exists a justifiable reason for Respondent's action, if the real motive for the firing was discrimination against Longie because of her union activity or affiliation, a violation of the Act has been committed. Thus, where union activity is a substantial or motivating cause for a discharge, such discharge will be found to be tainted with a discriminatory motive even though good cause also exists for the termination.<sup>128</sup> From a review of all of the evidence herein it is apparent that a substantial or motivating, but perhaps not necessarily sole reason contributing to Longie's discharge was her well known affiliation and activity on behalf of the Union and the Respondent's continued opposition to union representation of its employees, despite the existence of a lawful cause for such termination.<sup>129</sup>

Moreover Respondent's vacillation as to the reasons for Longie's layoff and termination as indicated hereinbefore is in itself strong evidence of Respondent's discriminatory motivation.<sup>130</sup>

In view of all of the above and from the evidence in the record as a whole, I find that by laying off and/or terminating Wanda Longie for a discriminatory reason Respondent violated Section 8(a)(3) and (1) of the Act.

#### F. The Alleged Discrimination Against Sheila Shepherd

The consolidated complaint herein alleges that during the month of February 1979, Respondent required Sheila Shepherd "to work alone on the swing shift" and starting in March 1979 and continuing thereafter required Shepherd "to work a less desirable shift than she had previously worked" all because of her "union-related or other protected concerted activities," in violation of Sec-

<sup>125</sup> *P. G. Berland Paint City, Inc.*, 199 NLRB 927 (1972), *enfd.* 478 F.2d 1045 (7th Cir. 1973); *Erie Strayer Co.*, 213 NLRB 344 (1974); *Klate Holt Co.*, 161 NLRB 1606 (1966).

<sup>126</sup> *N.L.R.B. v. United Parcel Service, Inc.*, 317 F.2d 912, 914 (1st Cir. 1963); *Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F.2d 423, 426 (7th Cir. 1962).

<sup>127</sup> *N.L.R.B. v. Coal Creek Coal Co.*, 204 F.2d 579, 583 (10th Cir. 1953).

<sup>128</sup> *N.L.R.B. v. Challenge Cook Bros.*, 374 F.2d 147, 152 (6th Cir. 1967); *N.L.R.B. v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964); *N.L.R.B. v. Mid-West Towel & Linen Service*, 339 F.2d 958, 962 (7th Cir. 1964).

<sup>129</sup> *O & H Rest., Inc., trading as The Backstage Restaurant*, 232 NLRB 1082 (1977); *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574 (1976); *N.L.R.B. v. Park Edge Sheridan Meats*, 341 F.2d 725, 728 (2d Cir. 1965); *N.L.R.B. v. Whittin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953).

<sup>130</sup> *N.L.R.B. v. Tekner-Apex Company*, 468 F.2d 692 (1st Cir. 1972); *Daniel Construction Company, a Division of Daniel International*, 229 NLRB 93 (1977); *The Dalton Company, Inc.*, 109 NLRB 1228 (1954).

<sup>122</sup> Longie testified that she was ill with tonsillitis during the latter part of December 1978 and had informed McEldery of this.

<sup>123</sup> Longie failed to appear for work on assigned days twice in January 1979.

<sup>124</sup> *O & H Rest., Inc., trading as The Backstage Restaurant*, *supra*. *Borin Packing Co., Inc.*, 208 NLRB 280 (1974); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 322 F.2d 913, 922 (9th Cir. 1963).

tion 8(a)(3) and (1) of the Act. The Respondent denies these allegations.<sup>131</sup>

### Analysis and Conclusions

As the record shows Sheila Shepherd, an LPN, normally worked the afternoon or swing shift from 3 to 11 p.m. and while ideally Respondent would like to schedule another LPN during the hours of 5 to 10 p.m. so as to have two LPNs on duty during the busiest time of the day at the nursing home, from July through October 1978, Respondent did not have such a "relief LPN" available. Therefore Shepherd worked the 3 to 11 p.m. shift alone during this time.<sup>132</sup> In November 1978, Respondent hired an additional LPN, Melanie Carr, assigned to work the 5 to 10 p.m. shift. As a result of this Shepherd worked alone 3 days in November 1978, 3 days in December 1978, and no days alone in January 1979.<sup>133</sup>

However, beginning in February 1979, the situation changed. The following schedule is illustrative of what occurred:

Month	Shifts Worked Alone	
	Shepherd	All Other LPNs <sup>134</sup>
Nov. 1978	3 of 12 days	5 of 25 days
Dec. 1978	3 of 10 days	5 of 27 days
Jan. 1979	0 of 16 days	2 of 31 days
Feb. 1979	6 of 17 days	3 of 23 days
Mar. 1979	9 of 13 days	1 of 9 days
Apr. 1979	4 of 10 days	7 of 19 days
May 1979	10 of 20 days	5 of 11 days

The evidence shows that while two other LPNs, Georgia Buchanan and Diane Hesch, had to work alone occasionally during the months of February through May 1979, one had to work alone as frequently as Shepherd. The record also shows that working alone on a swing shift was in some respects a hardship for the LPN assigned to that shift.<sup>135</sup>

Respondent in its brief states, "One could compare Sheila Shepherd's February and March schedule to that of the other LPNs who worked the swing shift and claim discrimination . . . . But the numbers do not tell the whole story." I agree. Sarah McEldery testified uncontradictedly<sup>136</sup> that the work schedule concerning the

LPNs on the swing shift was prepared during the relevant period with the following details in mind: Sheila Shepherd was the regular 3 to 11 p.m. swing shift LPN. Shepherd admittedly in late December 1978 requested leave to attend an Emergency Medical Training (EMT) course given on Tuesday and Thursday evenings at 7 to 10 p.m. which ran from January through April 1979. Respondent granted this request and Shepherd's course hours and days had to be scheduled around and considered; Melanie Carr, the part-time LPN who only worked the 5 to 10 p.m. shift was part-time and worked as a full-time LPN at another hospital so that her hours of work were restricted to the days she could or would come in.<sup>137</sup> The other LPN Diane Hesch works two 3 to 11 p.m. shifts and two 1 p.m. to 7 a.m. shifts, being assigned to the swing shift when Shepherd is off. It should also be remembered that Shepherd, in writing, had refused to work the 11 p.m. to 7 a.m. graveyard shift.

On the basis of the above although not without some doubt, I do not find that Shepherd was discriminated against in her work scheduling when she had to work the swing shift alone. However, my doubt concerning this issue stems from my awareness that Respondent knew at least in January 1979, if not before, that Sheila Shepherd was the other main union activist along with Wanda Longie. I am also cognizant of the fact that Respondent engaged in serious and continuous unfair labor practices in response to the Union's organizational campaign in an attempt to discourage its employees from assisting in the Union's efforts. Further, I fully realize the excellent opportunity this presented for retaliation against employees who were considered disloyal to Respondent when they supported the Union in opposition to its acknowledged wishes. Notwithstanding the above I feel that the General Counsel has not sustained the burden of proof on this issue as required.<sup>138</sup> It would appear that Shepherd's insistence on not working the graveyard shift, her enrollment in the EMT course, and Carr's part-time status account for such scheduling.

Concerning the allegation that Respondent discriminated against Sheila Shepherd by scheduling her to "a less desirable 5 to 10 shift," the General Counsel in its brief asserts that this occurred "following the election at the end of February" 1979 and "in lieu of the regular 3 to 11

<sup>131</sup> Respondent did admit at the hearing and in its brief that Sheila Shepherd worked alone on some swing shifts and worked "some" 5 to 10 p.m. shifts in March 1979, but denied that this violated Sec. 8(a)(3) and (1) of the Act.

<sup>132</sup> It should be noted that this was not confined solely to Shepherd since it appears from the evidence herein that other LPNs who worked the 3 to 11 p.m. shift during this period also worked alone.

<sup>133</sup> See Resp. Exhs. 4 (a-r).

<sup>134</sup> Beginning in November 1978 there were six LPNs including Shepherd. From December 1978 through February 1979 there were seven. In March 1979 an eighth LPN was hired. See Resp. Exhs. 4 (a-r). Respondent maintains that despite the increase in staff, it was still necessary for LPNs to work the swing shift alone.

<sup>135</sup> See the testimony of Buchanan and Shepherd as set forth hereinbefore.

<sup>136</sup> Notwithstanding my prior discrediting of McEldery's general testimony herein, I do not totally disbelieve all of it. A division of the credi-

bility resolution of a witness is not improper. A trier of fact is "not required to discount everything [witnesses] testified to because he did not believe all of it and nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3 (1970), *enfd.* 437 F.2d 502 (5th Cir. 1971).

<sup>137</sup> According to McEldery, Carr refused to work on her days off at the other hospital and since she had been appointed to work in surgery at that hospital sometime in May 1979, which placed her on call at any time, she only agreed to work "at her convenience," and if called for surgery duty she would leave Respondent's nursing home to report to the hospital for work. The record also shows that of nine 5 to 10 p.m. shifts worked by Carr in February 1979, five were on Tuesdays and Thursdays, the days Shepherd was at the EMT class and two of the remaining four shifts were worked with Shepherd as the 3 to 11 p.m. swing shift LPN. In March 1979 Carr worked Tuesdays and Thursdays each week that month. She also worked four other 5 to 10 p.m. shifts in March 1979, these with Shepherd.

<sup>138</sup> *N.L.R.B. v. Winter Garden Citrus Products Cooperative*, 260 F.2d 913 (5th Cir. 1978). Also see *Borin Packing Co., Inc.*, 208 NLRB 280, 281 (1974).

shift." The evidence shows that Shepherd worked four 5 to 10 p.m. shifts and one 5:30 to 8:30 p.m. shift in December 1978; none in January and February 1979; eight in March 1979; four in April 1979; one in May 1979 and none in June 1979. While the total number of hours Shepherd worked during March and April 1979 did not decrease, she was compelled to work more days in order to maintain the same amount of hours which she needed to secure the same salary as before. That in some ways this rescheduling to a 5 to 10 p.m. shift worked a hardship on Shepherd is supported by the evidence in the record.<sup>139</sup>

The Respondent asserts that Shepherd worked six of the eight 5 to 10 p.m. shifts in March 1979 on the nights that Diane Hesch was working the 3 to 11 p.m. shift in her schedule of alternating from the swing shift to the graveyard shift and back. However, Respondent admits that this situation was "superficially strange since Hesch is supposed to work swing when the primary swing shift nurse is off and Sheila Shepherd is the primary swing shift nurse."

Further, it should be noted that Shepherd testified that prior to February 1979 she had asked McEldery for additional hours of work, "an extra day in addition to the 3:00 to 11:00 p.m. shifts I was scheduled for" or some "extra 5:00 to 11:00." Shepherd also admitted that she received some 5 to 10 p.m. shift assignments to accommodate her EMT course hours.

The General Counsel contends that Respondent "devised a more oblique method of retaliating against Shepherd for her protected activities" by scheduling her to 5 to 10 p.m. shift assignments instead of terminating her as it did Wanda Longie because LPNs were in short supply and Respondent desperately needed them at the nursing home. The General Counsel further asserts that the conclusion to be drawn from the evidence herein is that "McEldery lived up to her threat to 'make it tougher on the girls once the election was over' at least as far as Shepherd is concerned. Respondent offered no logical explanation as to why circumstances had changed such in February or March to justify putting Shepherd on more five-hour shifts and requiring her to work alone."

This time I agree with the General Counsel as far as concerns the scheduling of Sheila Shepherd to a substantially increased number of 5 to 10 p.m. shifts in March and April 1979. The following undisputed facts are important. Diane Hesch was hired by Respondent in or about late December 1978 or early January 1979 after Shepherd had indicated to the Respondent that she would no longer work the graveyard shift. Shepherd had asked McEldery for additional hours of work sometime prior to February 1979 and the EMT course commenced in January 1979. Significantly Shepherd was not assigned

any 5 to 10 p.m. shifts in January or February 1979 but only in March and April 1979, and only one in May or June 1979. Respondent offered no evidence nor in fact any explanation as to why circumstances required the change in Shepherd's work scheduling at that particular time. The Respondent itself characterized the situation as "superficially strange" since Shepherd was the primary swing shift LPN and Hesch as a relatively new employee, a fill-in LPN.

From all of the above I am inexorably led to the conclusion that Respondent already having laid off and/or terminated Wanda Longie on February 1, 1979, as a vivid and object lesson to its other employees as to what could happen to them if they supported the Union, this being accomplished at just the critical period, a few weeks before the scheduled election on February 26, 1979, with Longie being one of the two employees most active in the Union's organizational campaign and being a nurses aide somewhat expendable under the circumstances, now having won the election Respondent sought to punish the other prime union mover, Sheila Shepherd, to preclude any further attempts at union representation. Moreover the need for experienced LPNs at the nursing home being critical it would appear that Respondent sought an alternate punishment to discharge to impose on Shepherd in order to discourage any possibility of her engaging in any union activity in the future, not wishing "to cut off its nose to spite its face," so to speak, and therefore did so by scheduling her to a shift which they could reasonably expect to make her unhappy as so it happened.<sup>140</sup> That her scheduling unexplainedly again changed abruptly in May and June 1979 after the consolidated complaint was issued herein on April 9, 1979, alleging these actions as violative of the Act only supports this conclusion.

In view of the above and from the evidence in the record as a whole I find that Respondent by requiring Sheila Shepherd to work a less desirable shift than she had previously worked because of her union activities thereby violated Section 8(a)(3) and (1) of the Act.

Further, Respondent in support of its contentions herein asserts in its brief that, "Moreover, the record contains evidence of similar discussions the preceding August after which nothing happened to any employee." However, the evidence clearly shows that in August the employees met with the Union only once, with no employee signing or soliciting other employee signatures on any union authorization cards at the time. Additionally according to the testimony of Respondent's own witness, Mary Johnson, after the employees met with the Union they soon thereafter went to Respondent's administrator George Montrose to apprise him of what was happening, whereupon Respondent resolved the employees' "biggest problem at that time . . . raising our wages" and everything was straightened out . . . there was no longer any interest by the employees in union representation. No

<sup>139</sup> Shepherd testified that scheduling to the 5 to 10 p.m. shift necessitated her working additional days to maintain the same number of hours worked and with the EMT course requiring her attendance on Tuesday and Thursday evenings, she never got a day off. Further she stated that since she has a young daughter who is left with a babysitter when she works, it was better for Shepherd to work a full 8 or 10 hours when on duty rather than 5 hours because she pays the babysitter as much for 5 hours as for 8 hours and getting her daughter "ready for the babysitter," and getting to work required the same "hassle" for the lesser as for the greater number of hours.

<sup>140</sup> As far as concerns Respondent's apparent "largesse" in granting Shepherd's request to attend the EMT course, this was done, it appears before Respondent knew in fact that Shepherd was actively engaged in the Union's campaign, although Montrose and McEldery may have had their suspicions about her union activities prior thereto.

more conflict." This is a far cry from what occurred in December 1978 and thereafter concerning the Union's organizational campaign and the active employee participation therein. Clearly in August 1978 Respondent had successfully dissipated the Union's support among its employees resolving their major complaint at the time, that of wages, and therefore had no need to engage in any further action including unfair labor practices. In fact realistically the above actually mitigates against Respondent rather than supports its positions taken herein.

### G. The Refusal To Bargain

Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representatives of its employees.

The consolidated complaint alleges that since on or about December 27, 1978, and thereafter, Respondent refused and continues to refuse to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in a unit appropriate for the purpose of collective bargaining in violation of Section 8(a)(5) and (1) of the Act. Respondent denies these allegations.

#### 1. The Union's majority status

As I previously found herein, the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

All licensed practical nurses, technical employees and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all other professional employees, business office clerical employees, guards and supervisors as defined in the Act.

At the hearing the parties stipulated that as of December 27, 1978, the date upon which the Union requested recognition and bargaining, there were a total of 39 employees in the appropriate bargaining unit described above.<sup>141</sup> The uncontroverted evidence herein shows that of these 39 employees, at least 29 signed union authorization cards between December 12 and 20, 1978.<sup>142</sup> The parties herein also stipulated to the authenticity of the signed authorization cards and no evidence was adduced which would impair their validity, these cards being single purpose cards and valid on their face.<sup>143</sup>

Accordingly, I find that, on the day the Union made its demand for recognition and bargaining, it represented a majority of Respondent's employees in the appropriate unit.

#### 2. Case 19-RC-9156

As stated above the Union made its demand upon Respondent for recognition on December 27, 1978, which demand Respondent refused. On January 10, 1979, the Union filed with the Board its petition for certification of

representative in Case 19-RC-9156 seeking an election among Respondent's employees in the appropriate unit. A secret-ballot election was held on February 26, 1979, pursuant to a consent election agreement executed by the parties herein. Excluding 2 challenged ballots, the vote was 17 for and 21 against the Union.

The Union filed timely objections to the election on March 2, 1979. The Regional Director for Region 19 issued a report on the objections on April 13, 1979, which concluded that the objections filed in Case 19-RC-9156 and the unfair labor practices alleged in Cases 19-CA-11149 and 19-CA-11179 were "identical" and an order consolidating these cases for the purpose of hearing, ruling and decision herein and thereafter a severance and transfer of Case 19-RC-9156 to the Regional Director for "further processing."

The Board normally relies upon conduct which occurred during the "critical period" preceding an election (i.e., during the period between the filing of the representation petition and the election itself) in determining whether an election should be set aside.<sup>144</sup> As found above, Respondent threatened and warned its employees that their working conditions would become "tougher" or "rougher" if the Union won the election (made by Sarah McEldery, director of nurses and Margaret Nelson, kitchen supervisor in February 1979), expressly and impliedly threatened that employees who supported the Union would, could and should be fired (made by McEldery and Nelson in late January or February 1979), unlawfully interrogated its employees as to their union affiliation and sympathies (by McEldery, Nelson, and George Montrose, administrator of the nursing home in January and February 1979), unlawfully solicited grievances from its employees and implied that such grievances would be remedied (by Montrose in January 1977), and unlawfully laid off and/or terminated Wanda Longie because of her union activities (on February 1, 1979). These unfair labor practices were both severe in impact and pervasive in timing and could not but have the effect of undermining the Union's majority strength, eroding the laboratory conditions necessary for the effectuation of a fair and meaningful election, and effectively thwarting the proper functioning of the Board's election processes.<sup>145</sup>

Having found that Respondent committed serious unfair labor practices, occurring between the filing of the petition on January 10, 1979, and the holding of the election on February 26, 1979, which interfere with the employees' free and untrammelled choice of representation, these unfair labor practices being identical to the objections raised by the Union with regard to the election held on February 26, 1978, which I now sustain, I recommend that this election in Case 19-RC-9156 be set aside.<sup>146</sup>

<sup>141</sup> See fn. 4, *supra*.

<sup>142</sup> See fns. 6 and 7, *supra*.

<sup>143</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Cumberland Shoe Corporation*, 144 NLRB 1268 (1963), *enfd.* 351 F.2d 917 (6th Cir. 1963).

<sup>144</sup> *Apple Tree Chevrolet, Inc.*, 237 NLRB 867 (1978); *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962); *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).

<sup>145</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, *supra*.

<sup>146</sup> See *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962).

### 3. The applicability of a bargaining order

The consolidated complaint alleges that the unfair labor practices committed by Respondent are "so serious and substantial in character and effect as to preclude the holding of a fair election and warrant the entry of a remedial order requiring Respondent to recognize and bargain with the Union as the representative of the employees in the unit." The Respondent denies this and asserts in substance that even if the Respondent did engage in unfair labor practices, these were not extensive and could have no impact on the election process.

In *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court approved the Board's use of bargaining orders to remedy an employee's independent 8(a)(1) and (3) violations which undermined a union's majority status and fatally impeded the holding of a fair election. In doing so, the Court held that such orders would be appropriate in two situations. The first involves unfair labor practices which are so "outrageous" and "pervasive" that traditional remedies cannot eliminate their coercive effect, with the result that a fair election is rendered impossible. The second, as described by the Court (at 614-615), is:

... in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the Union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The Court additionally stated elsewhere in *Gissel* that, "perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign,"<sup>147</sup> by means of a bargaining order.

The Board itself stated in *Ship Shape Maintenance Co., Inc.*, 189 NLRB 395, 395-396 (1971):

It is now settled that serious illegal activity accompanying an employer's refusal to grant recognition and to bargain with the majority representative

of its employees destroys the necessary conditions for the holding of a free and fair election . . . .<sup>7</sup>

The foregoing unlawful conduct not only precluded the holding of a fair election in the representation proceeding the Union had instituted, but, in our judgment, was of a sufficiently pervasive and extensive character . . . to have likely served its intended purpose of undermining the Union's preexisting majority. In these circumstances we believe that restoration of the *status quo ante* is required in order to vindicate employee rights and prevent Respondent from profiting from its own unfair labor practices. We are further of the opinion that the lingering effects of Respondent's past coercive conduct render uncertain the possibility that traditional remedies can ensure a fair election. We therefore conclude, on balance, that the Union's majority card designations obtained before the unfair labor practices occurred provide a more reliable test of employee representation desires, and better protect employee rights, than would a rerun election.<sup>148</sup>

<sup>7</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575.

The Board's decision to issue a bargaining order is based upon all the circumstances of the case including the nature of the violations and the context in which they occurred. It is pursuant to such an overall evaluation that the Board makes its finding.<sup>149</sup> Normally the Board bases its *Gissel* bargaining orders upon all unfair labor practices committed by a particular respondent which interfered with, restrained, and coerced employees in the exercise of their Section 7 rights.<sup>150</sup>

The Union commenced its organizational campaign sometime in early December 1978. Soon thereafter, upon learning in mid-December 1978 that its employees were engaging in union activities Respondent commenced its unfair labor practices continuing thereafter to engage in various flagrant violations of Section 8(a)(1) and (3) of the Act to undermine the Union.

Respondent, through its representatives Sarah McEldery, Margaret Nelson, and George Montrose, respectively,<sup>151</sup> expressly and impliedly threatened and warned its employees that if they signed union authorization cards or otherwise engaged in union activities they would and could be laid off or terminated, that if the Union came in employee working conditions would be made "tougher" or "rougher," and that employee support of the Union could delay a projected wage increase. As stated hereinbefore a direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an

<sup>148</sup> See also *Petrolane Alaska Gas Service, Inc.*, 205 NLRB 68 (1973); *Joseph J. Lachniet, d/b/a Honda of Haslett*, 201 NLRB 855 (1973), enf'd. 490 F.2d 1382 (6th Cir. 1974).

<sup>149</sup> *Rennselaer Polytechnic Institute*, 219 NLRB 712 (1975).

<sup>150</sup> *Rapid Manufacturing Company*, 239 NLRB 465 (1979); *Baker Machine & Gear, Inc.*, 220 NLRB 194, 195 (1975); *Idaho Candy Company*, 218 NLRB 352, 358-359 (1975).

<sup>151</sup> The respective actions attributable to McEldery, Nelson, and Montrose committed by them individually and particularly and which constitutes the unfair labor practices have been set forth in detail hereinbefore.

<sup>147</sup> 395 U.S. at 612.

employer can dissuade employees from selecting a bargaining representative.<sup>152</sup>

As the Board stated in *General Stencils, Inc. supra*, 1110:

Such conduct is especially repugnant to the purposes of the Act because no legitimate justification can exist for threatening to close a plant or to impose more onerous and severe working conditions in the event of a union victory. Such threats can only have one purpose, to deprive employees of their right freely to select or reject a bargaining representative.<sup>153</sup>

Continuing, Respondent through its representatives McEldery, Nelson, and Montrose, unlawfully interrogated its employees concerning their union activities and support thereof and the coercive effect upon these employees can be no more clearly illustrated than by the fact that employees denied having any involvement with the Union for fear of reprisal that acknowledgement might bring.<sup>154</sup>

Also, Respondent, through its representatives Montrose and McEldery, solicited grievances and implied they would be remedied. This is conduct which attempts to extirpate the very source of the employee's interest in collective representation and goes to the heart of the organizational attempt. As the Board stated in *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974):

In essence, we are presented with a situation where in the Respondent has deliberately embarked upon a course of action designed to convince the employees that their demands will be met through direct dealing with Respondent and that union representation could in no way be advantageous to them. Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence. We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain. Neither is there any conduct which could constitute a greater impairment of employees' basic Section 7 rights under our Act, especially since such conduct by its very nature has a long-lasting, if not permanent, effect on the employees' freedom of choice in selecting or rejecting a bargaining representative.

Respondent additionally, through its representative, Margaret Nelson, directed its employees not to discuss anything about the Union after January 10, 1979, and until the election to be held on February 26, 1979. This action tended to coerce, restrain, and interfere with the

employees' exercise of the rights guaranteed them in Section 7 of the Act.<sup>155</sup>

Further, the record clearly shows that Respondent's actions, as set forth above, were not mere isolated and haphazard instances of misconduct but were part and parcel of a systematic, well-planned campaign to discourage and dissipate the Union's majority status. Respondent also unlawfully laid off and/or terminated Wanda Longie and discriminated against Sheila Shepherd concerning her conditions of employment, these particular employees being the leading supporters of the Union and these actions constituted serious and effective reminders to all its employees of the dangers inherent in continuing to support the Union.<sup>156</sup>

As detailed above, Respondent here engaged in serious violations of Section 8(a)(1) and (3) of the Act, which were calculated to defeat the Union's organizational effort then and in the future and to decisively and permanently undermine its status among the employees. They included, *inter alia*, threats and warnings of layoff and/or termination, that a projected wage increase would be delayed and that working conditions would be made tougher; interrogation; solicitation of grievances; directions to employees not to discuss the Union; and the unlawful layoff and termination of one, and discrimination concerning working conditions against the other of the two most active supporters of the Union among its employees. Consideration must also be given to the speed of Respondent's actions commencing immediately upon learning that its employees were engaging in union activities. I therefore believe that these unfair labor practices were so severe, extensive, and pervasive as to make the application of traditional remedies ineffective and to afford no guarantee that an election would provide a more accurate index of employee's sentiment than the authorization cards executed by a majority of the employees. In these circumstances, I find that "employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order."<sup>157</sup> The only reasonable conclusion that can be drawn from the foregoing is that the various acts of restraint, coercion, and discrimination committed by Respondent had a clear tendency to, and did in fact, undermine the Union's majority strength and interfered with the election held on February 26, 1979.

As the Supreme Court has held, an employer has a right to a Board election so long as he does not impede the election process.<sup>158</sup> However, when he so obstructs the process, he forfeits his right to an election and must bargain with the Union on the basis of other clear indications of the employees' desires, and his bargaining obliga-

<sup>152</sup> See fn. 112, *supra*.

<sup>153</sup> *Jefferson National Bank, supra*; *Twilight Haven, Inc.*, 235 NLRB 1337 (1978); *Hambre Hombre Enterprises, Inc., d/b/a Panchito's*, 228 NLRB 136 (1977); *Motel 6, Inc.*, 207 NLRB 473 (1973); *A. J. Krajewski Manufacturing Co., Inc.*, 180 NLRB 1071 (1970).

<sup>154</sup> *N.L.R.B. v. Gissel Packing Co.*, *supra* at 614, 615; *Armcor Industries, Inc.*, 227 NLRB 1543, 1544 (1977); *Multi-Medical Convalescent and Nursing Center of Towson*, 225 NLRB 429 (1976), *enfd.* 550 F.2d 974 (4th Cir. 1977); *Trading Port, Inc.*, 219 NLRB 298 (1975).

<sup>155</sup> *Linden Lumber Division, Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974).

<sup>156</sup> *General Stencils, Inc.*, 195 NLRB 1109 (1972), enforcement denied 472 F.2d 170 (2d Cir. 1972).

<sup>157</sup> Also see *Richard Tischler, et al., d/b/a Devon Gables Lodge & Apartments & Devon Gables Nursing Home*, 237 NLRB 775 (1978); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 523, 536 (4th Cir. 1941).

<sup>158</sup> *O & H Rest., Inc., trading as The Backstage Restaurant, supra*.

tion commences as of the time that he embarked on a clear course of unlawful conduct or engaged in sufficient unfair labor practices which undermine the Union's majority status and subvert the Board's election process.<sup>159</sup>

In the instant case, Respondent embarked on its campaign to destroy the Union's support among unit employees sometime in mid-December 1978, when it commenced its unfair labor practices by unlawfully threatening, warning, and interrogating its employees. However, inasmuch as the Union's demand for recognition was not made until December 27, 1978, I conclude that Respondent should be required to recognize and bargain, upon request, with the Union as of December 27, 1978.<sup>160</sup>

From all of the above, I find and conclude that by refusing to recognize and bargain with the Union upon request and thereafter engaging in the unfair labor practices found herein, Respondent violated Section 8(a)(5) and (1) of the Act, and that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and to otherwise remedy the violations committed.<sup>161</sup>

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As to the unfair labor practices committed by Respondent, which were serious and go to the very heart of the Act, I shall recommend that it cease and desist therefrom and in any other manner from interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.<sup>162</sup>

Having found that Respondent did unlawfully lay off and terminate Wanda Longie, it is recommended that Respondent offer her immediate and full reinstatement to her former position or, if said position no longer exists, to a substantially equivalent position, without loss of seniority, or other benefits, and make her whole for any loss of pay resulting from the discrimination against her by payment of a sum of money equal to the amount she normally would have earned as wages from the date of her layoff and termination to the date of a bona fide

offer of reinstatement, less net interim earnings. The backpay due under the terms of the recommended Order shall include interest to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>163</sup>

Having found that Respondent discriminated against Sheila Shepherd by requiring her to work a less desirable shift than she had previously worked, I will recommend that it cease and desist therefrom.<sup>164</sup>

In view of Respondent's extensive and pervasive unfair labor practices which were calculated to destroy the Union's previously enjoyed majority status, and since I am persuaded that the application of traditional remedies for the said unfair labor practices cannot eliminate the lingering and restraining effects thereof and makes the holding of a fair and meaningful rerun election virtually impossible, I regard the employees' signed authorization cards as a more reliable measure of their representation desires. I will therefore recommend the issuance of an order requiring Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit.<sup>165</sup>

Having also found that Respondent's unfair labor practices were so serious, extensive, and pervasive as to warrant the setting aside of the election previously held on February 26, 1979, I will recommend that such election held in Case 19-RC-9156 be set aside and the petition dismissed in view of the recommended bargaining order herein. In the event my recommendation that Respondent be ordered to recognize and bargain with the Union is not sustained, I recommend that the petition not be dismissed and a second election be held at such time as the Regional Director for Region 19 deems appropriate.<sup>166</sup>

#### CONCLUSIONS OF LAW

1. The Respondent, Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has thereby en-

<sup>159</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Also see *Olympic Medical Corporation*, 250 NLRB 146 (1980); *W. Carter Maxwell d/b/a Pioneer Concrete Co.*, 241 NLRB 264 (1979).

<sup>160</sup> No request for any monetary loss due to the discrimination against Shepherd by Respondent was made by the General Counsel. It would appear from the record that Shepherd suffered no salary loss since her hours remained the same. The only possible loss she might have suffered is additional babysitter costs since she had to work more days than before in order to maintain the same number of hours previously worked. However, there was no testimony in the record that such a loss was sustained.

<sup>161</sup> *N.L.R.B. v. Gissel Packing Co.*, supra; *The Trading Port, Inc.*, supra; *O & H Rest., Inc., trading as The Backstage Restaurant*, supra; *Westminster Community Hospital, Inc.*, 221 NLRB 185 (1975).

<sup>162</sup> See *Rapid Manufacturing Company*, 239 NLRB 465 (1978).

<sup>159</sup> *The Trading Port, Inc.*, supra; *Baker Machine & Gear, Inc.*, supra.

<sup>160</sup> *The Trading Port, Inc.*, supra.

<sup>161</sup> *N.L.R.B. v. Gissel Packing Co.*, supra; *The Trading Port, Inc.*, supra.

<sup>162</sup> *Hickmott Foods*, 242 NLRB 1357 (1979); *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426 (1941); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941).

gaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Threatening and warning its employees with layoff and/or termination, with loss of a projected wage increase and with "tougher" or "rougher" working conditions if they continued to support or assist the Union.

(b) Coercively interrogating its employees concerning their union activities and sympathies.

(c) Soliciting employees' grievances and impliedly promising that such grievances would be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(d) Prohibiting employees from discussing the Union at any time at Respondent's premises thus obstructing their right to freely engage in union organizational activity including free discussion thereof.

4. By laying off and terminating Wanda Longie and refusing to reinstate her and by requiring Sheila Shepherd to work less desirable shifts than she had previously worked, because of their union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. The allegation in the consolidated complaint that Respondent violated Section 8(a)(3) and (1) of the Act by requiring Sheila Shepherd to work alone on the swing shift during the month of February 1979 has not been sustained.

6. All licensed practical nurses, technical employees and service and maintenance employees including aides, housekeepers, food service and maintenance personnel, but excluding RNs and all other professional employees, business office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. By refusing on or after December 27, 1978, to recognize and bargain with the Union as the collective-bargaining representative of its employees in the unit found appropriate above, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. By the finding heretofore made with respect to the objections in Case 19-RC-9156, Respondent Employer engaged in preelection misconduct interfering with the election conducted on December 26, 1978.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>167</sup>

The Respondent, Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center, Dillon, Montana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening and warning its employees with layoff and/or termination and with "tougher" or "rougher"

working conditions if they continue to support or assist the Union.

(b) Coercively interrogating its employees concerning their union activities and sympathies.

(c) Soliciting employees' grievances and impliedly promising that such grievances will be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(d) Prohibiting employees from discussing the Union at any time at Respondent's premises thus obstructing their right to freely engage in union organizational activity including free discussion thereof.

(e) Discouraging membership in or support of Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, or any other labor organization, by laying off or otherwise terminating the employment of its employees, or by requiring employees to work less desirable shifts, or in any other manner discriminating against them with respect to their hire, tenure, or other terms or conditions of employment.

(f) Refusing to recognize and bargain with Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the unit found appropriate herein.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.<sup>168</sup>

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Wanda Longie immediate and full reinstatement to her former position or, if that position is no longer available, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed.

(b) Make Wanda Longie whole for any loss of pay which she may have suffered by reason of the discrimination against her, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Upon request, recognize and bargain with Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit set forth above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

<sup>167</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>168</sup> A broad order is warranted herein as indicated by the serious unfair labor practices found. *O & H Rest., Inc., trading as The Backstage Restaurant*, supra; *The Stride Rite Corporation*, supra; *Ann Lee Sportswear, Inc.*, 220 NLRB 982 (1975).

(e) Post at its Dillon, Montana, facility, copies of the attached notice marked "Appendix."<sup>169</sup> Copies of the notice on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

<sup>169</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS ALSO ORDERED that the consolidated complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(3) and (1) of the Act by requiring Sheila Shepherd to work alone on the "swing shift" in February 1979.

IT IS FURTHER ORDERED that the election held on February 26, 1979, in Case 19-RC-9156 be, and it hereby is, set aside and the petition filed therein be dismissed.<sup>170</sup>

<sup>170</sup> In the event the Board does not order Respondent to recognize and bargain with the Union, the recommended Order herein shall read,

IT IS FURTHER ORDERED that Case 19-RC-9156 be, and it hereby is, severed and transferred to the Regional Director for Region 19 for further processing.